
SPEAKING WITH ONE BROADBAND VOICE: THE CASE FOR A UNIFIED CIRCUIT APPEALS PROCESS AFTER *BRAND X INTERNET SERVICES V. FCC*

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I. INTRODUCTION

One begins to imagine 200 years of communication technology all coming together at once when regulators, politicians, economists, and business leaders talk about the promise of high-speed Internet access. The high capacity infrastructures that provide broadband access are to the 21st century what roads, canals, and railroads were to the 1800s and what basic telecommunications services like the telephone and television were to the last century.¹ Politicians in the Great Depression promised “a chicken in every pot and a car in every garage.”² Today, broadband access for all Americans has become a political and a business priority.³

An ambitious policy to develop a nationwide broadband pipeline plays a critical role in shaping and developing the U. S. economy.⁴ One economic study concluded that “the total annual benefits to the U.S. economy of the

¹ See Availability of Advanced Telecommunications Capability in the United States, *Fourth Report to Congress*, in Dkt. No. 04-54, FCC 04-208, at 5 (Sept. 9, 2004) [hereinafter *Advanced Telecommunications Report*] (dissenting statement of Commissioner Michael Copps).

² Anne Marie Squeo, *Election Pledge: Broadband Access for All*, WALL ST. J., Sept. 14, 2004, at A4 (stating that just as supporters of President Herbert Hoover during the Great Depression made such aspirant promises, a nationwide broadband rollout has become an important political issue).

³ David Lieberman, *Election Should Be a Pro for Cable, No Matter Who Wins*, USA TODAY, Sept. 3, 2004, at B6.

⁴ Bryan Gruley, *Pipe Dreams: Must AT&T Give Internet Rivals Access to TCI's Network?* WALL ST. J., Jan. 15, 1999, at A1 (“[T]he world is witnessing the birth of an industry – with the Internet as its vehicle – that is motivating regular people to spend huge sums of money . . . Like the auto and steel industries of the early 20th century, online commerce is changing the way the economy works.”).

widespread adoption of broadband access in all its forms—ADSL, cable modems, satellites, 3G wireless, and others—could be more than \$400 billion per year.”⁵ The debate over widespread broadband deployment does not center on necessity, but rather on the regulatory means to achieve this goal.⁶ Communication regulators with different perspectives refer to broadband deployment as “the central communication policy objective of the era”⁷ and a “central infrastructure challenge.”⁸

The Telecommunications Act of 1996 (“1996 Act”), which makes deregulation of the communications industry a priority, encourages the widespread de-

⁵ Robert W. Crandall & Charles L. Jackson, *The \$500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access*, CRITERION ECON., July 2001 at iv.

⁶ *NewsHour with Jim Lehrer* (PBS television broadcast, Aug. 21, 2001). In his first interview as the newly appointed Federal Communications Commission Chairman, Michael Powell told *NewsHour* media reporter Terence Smith that “the economic system that world history has demonstrated maximizes consumer welfare more than others are those that make efficient use of market mechanisms.” *Id.* The Chairman argued that American market capitalism had proven over time to “maximize consumer welfare to a great degree.” *Id.* From his point of view, given the strength of the U.S. economy, the best means of achieving a desired policy goal such as access to the Internet via broadband – any time, any where – is through a market-oriented approach. All five Commissioners at the FCC agree Congress charged the Commission with promoting national broadband deployment for all Americans, but often disagree on how to achieve that goal. *See generally Advanced Telecommunications Report, supra* note 1, at 3-7. One side argues that the government’s role should be to facilitate competition within the broadband market in order to spur greater deployment. By eliminating barriers to infrastructure investment, broadband deployment will be accelerated. *See* Patrick Ross, *White House Sees Regulation As Must in Promoting Broadband*, *Communications Daily*, July 29, 2004, available at 2004 WL 60706753 (“Having the government get out of the way [of the private sector as it deploys broadband] is an important goal.”) (quoting Phil Bond, Under Secretary of Commerce for Technology, at a briefing for reporters on the Bush administration’s efforts to promote multiple broadband options for consumers). *But see Advanced Telecommunications Report, supra* note 1, at 5 (dissenting statement of Commissioner Michael Copps) (arguing that market forces alone have not produced rapid deployment to communities traditionally unserved in rural America and often “[t]he history of great infrastructure developments in this country” point to private-public sector partnerships); *see also* Squeo, *supra* note 2 (summarizing the arguments made for a national broadband policy, finding that the central question remains: “should a nationwide broadband roll-out be subsidized by the government ...”). Although the debate over federal subsidies for broadband deployment continues, evidence points to a developing market environment encouraging growth in broadband services and investment. *See, e.g., Advanced Telecommunications Report, supra* note 1, at 14-23. As one newspaper reported, it’s a “Free-for-All; telecom companies [offering broadband] are invading one another’s turf like never before” which means lower prices and more choices for consumers. Almar Latour, *Free-For-All*, *WALL ST. J.*, Sept. 13, 2004, at R1.

⁷ Jeff Pulver, *VON Pioneers: FCC Chairman Michael Powell*, *VON MAGAZINE*, Sept./Oct. 2004, at 22.

⁸ *Advanced Telecommunications Report, supra* note 1, at 5 (dissenting statement of Commissioner Michael Copps).

ployment of broadband technology.⁹ Congress gave the Federal Communications Commission ("FCC" or "Commission") a policy goal to "encourage the ubiquitous availability of broadband."¹⁰ While legislators provided grandiose forethought, they offered few details on making it a reality. The 1996 Act mandated that the FCC deploy advanced telecommunications capability on a reasonable and timely basis to all Americans through "regulatory forbearance, measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment."¹¹

Unfortunately, the national communications policy decisions regulated by the Act are not being formulated by administrative regulators experienced in communications issues, but rather by federal circuit judges who often lack the requisite experience in communication policy.¹² A particular instance of egre-

⁹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.) (stating that the purpose of the act was "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies"). See also *id.* §§706(a), (b), (c)(1), 110 Stat. 153 (set forth as note following 47 U.S.C. §157 (2000)) ("The Commission . . . shall encourage the deployment of advanced telecommunications capability to all Americans." The statute defines "advanced telecommunications capability" as "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.").

¹⁰ *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers, Notice of Proposed Rule-making*, 17 FCC Rcd. 3019, para. 3 (2002) [hereinafter *Wireline Broadband NPRM*].

¹¹ Telecommunications Act of 1996, Pub. L. No. 104-104, §706(a), 110 Stat. 153 (note following 47 U.S.C. §157 (2000)); see, e.g., *id.* §10(a)(3), (b), 110 Stat. 128 (codified as 47 U.S.C. §160 (2000));

[T]he Commission shall forbear from applying any regulation or any provision of this Act to a . . . telecommunications service, or class of . . . telecommunication services . . . if the Commission determines that (3) forbearance of such regulation or provision is not necessary with the public interest. (b) In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions.

Id.; see also *Advanced Telecommunications Report*, *supra* note 1, at 8 (concluding advanced telecommunications capability is currently being deployed on a reasonable and timely basis).

¹² See generally Michael Botein, *Judicial Review of FCC Action*, 13 CARDOZO ARTS & ENT. L.J. 317, 324 (1995). Professor Botein has been a faculty member of the New York Law School since 1977, and currently teaches Administrative Law, Mass Communications and Telecommunications Law, and Media Law. He is the founding director of the Communications Media Center at the law school. This law review article was written because "[t]o date, no secondary literature has addressed judicial review of FCC action in any detail." *Id.* at 318. It was written to help FCC practitioners in the area of appellate work, which he calls "difficult." *Id.* Much of the article discusses the "mutually exclusive" judicial review provisions under the Communications Act, 47 U.S.C. §402(a), (b). He writes an excellent historical perspective about the exclusive review Congress gave the D.C. Circuit because of "apparent goal . . . to centralize judicial review of a then 'new technology'" when the Radio

gious judicial policy making is *Brand X Internet Services v. Federal Communications Commission*,¹³ where the Ninth Circuit was asked to review the FCC's regulatory classification of cable modem services under the 1996 Act, based on the administrative record, the Commission's expertise in communications law, and its reasonable legal analysis given the Act's ambiguity.¹⁴ The

Act of 1927 was passed. *Id.* at 324. Professor Botein points out that "the D.C. Circuit has developed a formidable amount of expertise in communications" although he states "other Courts of Appeals also have skills" in communications. *Id.* at 324-25. It is worth noting that his article was written prior to the passage of the 1996 Act, which extended the D.C. Circuit's exclusive jurisdiction under §402(b)(9) to review Bell Operating Company's entry into interLata services described in §271. *See Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 655 (D.C. Cir. 2004) (drawing distinctions between §§402(a) and (b) stating that §402(b) "provides for appeal of FCC orders in nine enumerated situations"). Petitions for review of rulemaking and non-licensing orders may be filed in any U.S. court of appeals where venue exists under 47 U.S.C. §402(a) (2000). *Id.* Professor Botein has a terrific quote by former Chief Justice of the Supreme Court William Howard Taft, quite relevant to this article and the timidity of federal courts to "make decisions in the area of high-technology." *Botein, supra* note 12, at 343, n.35. Chief Justice Taft once complained about the Radio Act of 1927; "Interpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural." *Id.* at 324. These conclusions by Mr. Botein prior to the 1996 Act make a stronger case for the arguments made by this Comment and today's communication legal woes.

¹³ *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003); *cert. granted* 125 S.Ct. 655 (2004), and *cert. granted*, *Nat. Cable & Telecomm. Ass'n, Inc. v. Brand X Internet Servs.*, 125 S.Ct. 654 (2004) (cases consolidated).

¹⁴ *See AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999) (Souter, J., concurring in part and dissenting in part) ("It would be gross understatement to say that the 1996 Act is not a model of clarity. That is most unfortunate for a piece of legislation that profoundly affects a crucial segment of the economy worth tens of billions of dollars.") Both the majority and the concurring opinion of Justice Souter agreed that under the Court's prior decision in *Chevron USA, Inc. v. Natural Resources Defense Council*, the FCC merits deference when it reasonably interprets and implements disputed provisions found in the Telecommunications Act of 1996. *Id.* To determine whether the FCC's analysis and conclusion about an ambiguous issue could be deemed reasonably defensible, courts should ask "if the question is sensible and the answer fair." *Id.* at 401. If so, "*Chevron* deference surely requires us to respect the Commission's conclusion." *Id.* In *AT&T Corp. v. Iowa Utilities Bd.*, the Court held the Commission's interpretation of "necessary" and "impairment" requirements under 47 U.S.C. §251 for "network elements" primary unbundling rules was unreasonable. Writing for the majority, Justice Scalia indicated that not only was the 1996 Act in many respects "a model of ambiguity" but also self-contradictory. *Id.* at 397. However, Congress knew the legislative ambiguities it chose to write in the 1996 Act, according to Justice Scalia, would "be resolved by the implementing agency." *Id.* *See also* Richard Murphy, A "New Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom, 56 ADMIN. L. REV. 1, 2 (2004) ("A court conducting *Chevron* review checks whether an agency's interpretation of a statute it administers falls within the zone of 'reasonable' construction; that is, rather than determine 'what the law is,' the court instead determines whether the agency has landed within what the law permits."). As discussed later, the Ninth Circuit Court in *Brand X Internet Service* completely did away with *Chevron* deference analysis regarding the FCC's regulatory conclusion with cable modem broadband. *See discussion infra* Part III.

Commission had concluded that "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service."¹⁵ The Ninth Circuit vacated the FCC's classification of cable modem service as an "information service" under the 1996 Act.¹⁶ The court found that cable modem services should not be classified as either cable service (as Portland city officials had previously argued to the court in *AT&T v. City of Portland*)¹⁷ or information service (as the FCC eventually concluded), but rather a regulatory classification that includes both a telecommunications service component in addition to an information service.¹⁸ Not to be usurped by the FCC, the Ninth Circuit declared, "the FCC . . . is not the only, not even the first, authoritative body to have interpreted the provisions of the Communications Act as applied to cable broadband service."¹⁹ The court based its opinion on its redundant prior case law.²⁰ In essence, the judges appointed themselves ad-hoc FCC

¹⁵ *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd. 4798, para. 7 (2002), *rev'd in part, vacated in part by*, *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (2003) [hereinafter *Cable Declaratory Ruling*].

¹⁶ *Brand X Internet Servs.*, 345 F.3d at 1132.

¹⁷ 216 F.3d 871, 878 (9th Cir. 2000) (holding Internet services provided by cable facilities contained both information service and telecommunications service components under the Telecommunications Act of 1996); *see also* discussion *infra* Parts III.A.1, 2.

¹⁸ *Id.* at 1125. The court in *AT&T v. City of Portland* and *Brand X* made it explicitly clear "that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue" before the court, failing to take a position from the onset. *Brand X Internet Servs.*, 345 F.3d at 1125, 1131, *citing City of Portland*, 216 F.3d at 876. *But see* United States Telecomm. Ass'n v. FCC, 359 F.3d 554, 588 (D.C. Cir. 2004) ("The FCC generally has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business.").

¹⁹ *Brand X Internet Servs.*, 345 F.3d at 1127.

²⁰ *Brand X Internet Servs.*, 345 F.3d at 1132 ("Our holding in *Mesa Verde* along with that of the Supreme Court in *Neal*, requires our adherence to the interpretation of the Communications Act we announced in *Portland*."); *see also* *Neal v. U.S.*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."); *see also* *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (9th Cir. 1988) (providing for an exception where precedent conflicts with an agency's subsequent interpretation "if a panel finds that [an agency] interpretation of the [federal] laws is reasonable and consistent with those laws, the panel may adopt that interpretation even if circuit precedent is to the contrary" but the *Mesa* rule is qualified in cases involving *Chevron* deference of an administrative agency statutory construction and reasoned decision making); *see, e.g., Cable Declaratory Ruling, supra* note 15, at para. 57 (comparing the Ninth Circuit's decision in *City of Portland* on "a record that was less than comprehensive" to a record compiled in "this proceeding, developed over a course of a year through written comments and replies . . . fully address[ing] the classification issue . . ."). The court in *Brand X* pointed out that it did not apply *Chevron* doctrine to its previous decision involving cable modem broadband, and furthermore, it did not find the Communica-

Commissioners and imposed their own vision of national broadband policy.

The importance of a coherent national broadband policy surrounding the growth of communications technology makes it a priority to develop a fair and efficient administrative review procedure from one well-versed and fully competent circuit court.²¹ In *Brand X*, seven different petitions were filed in the Third, Ninth, and District of Columbia Circuit Courts. Each sought review of the FCC's classification of cable modem as an information service, insisting the Commission "should have made an additional determination."²² Current rules allow litigants to file petitions for review of such orders in various courts of appeals, within ten days of the issuance of a Commission Order and its publication in the Federal Register, litigants can.²³ Under 28 U.S.C. §2112, these various petitions to review administrative orders trigger a lottery conducted by the Judicial Panel on Multidistrict Litigation.²⁴ Emerging communications technologies and the ambiguities of the 1996 Act make it difficult for jurists to draw boundaries between deciding what the law is and writing communication policy.²⁵ Of the federal circuit courts, the D.C. Circuit has the most experience in reviewing communications rules and regulations because of its exclusive appellate jurisdiction authorized by the Communications Act.²⁶ This Comment

tions Act to be ambiguous on this issue. *Brand X Internet Servs.*, 345 F.3d at 1131. *But cf.* *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power*, 534 U.S. 327, 347 (2002) (Thomas, J., concurring in part, dissenting in part) ("[T]he Commission clearly [needs to] explain the specific statutory basis on which it is regulating rates for [pole] attachments that provide . . . high-speed Internet access. [That] would require the [FCC to finally conclude whether broadband services] provided through cable wires constitutes cable service or telecommunications service or falls into neither category.").

²¹ *Compare AT&T v. City of Portland*, 216 F.3d at 877 (determining whether the City of Portland could condition the transfer of a local franchise agreement subject to opening access to cable facilities for competing Internet Service Providers (ISPs) required the court to define Internet services under the Communications Act) *with MediaOne Group, Inc. v. County of Henrico, Va.*, 257 F.3d 356, 359, 366 (4th Cir. 2001) (finding a county ordinance conditioning approval of transfer of cable TV franchise on the franchisee's granting other ISPs access to its cable modem platform preempted by federal law).

²² *Brand X Internet Servs.*, 345 F.3d at 1127.

²³ *See, e.g., Prometheus Radio Project v. FCC*, 373 F.3d 372, 388 (3rd Cir. 2004) ("Within days of the publication of the Order, several organizations filed petitions for review . . . in various courts of appeals, some contending that the Commission had gone too far in revising [media ownership] rules, and asserting that the Commission had not gone far enough.").

²⁴ 28 U.S.C. §2112(a)(3) (2000).

²⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Justice Marshall declared for the Court the "province and duty . . . to say what the law is"). *Compare AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999) ("It would be gross understatement to say that the 1996 Act is not a model of clarity . . . We can only enforce the clear limits that the 1996 Act contains.") *with Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power*, 534 U.S. 327, 329 (2002) ("[T]he subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent.").

²⁶ *See generally* 47 U.S.C. §402(b)(1)-(9) (2000).

argues that the United States Court of Appeals for the District of Columbia Circuit should have exclusive jurisdiction under 47 U.S.C. §402(b) to review FCC development of a national policy over the widespread deployment of broadband as mandated by Congress.

Consistent with section 230(b)(2) of the Act, the FCC has sought to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation” consistent with section 230(b)(2) of the Act.²⁷ Part II of this Comment discusses the regulatory classifications that various communications services merit under the 1996 Act. This section contends a market-oriented approach will spur the growth and development of broadband, and demonstrates how the Commission, encouraged by Congress, has followed this economic justification with positive results. The FCC has the unique capability and expertise to develop a national policy that promotes and implements the widespread deployment of broadband through deregulation. Part III compares how two circuit courts applied *Chevron* deference to FCC administrative decision making when faced with difficult legal questions about cable modem service. This Comment criticizes the Ninth Circuit’s decision in *AT&T v. Portland*, a decision the court later upheld when it usurped FCC authority in *Brand X*.²⁸

In Part IV, this Comment analyzes the Supreme Court’s decision in *NCTA v. Gulf Power*,²⁹ holding that the FCC was given wide discretion by Congress to develop a national broadband policy.³⁰ Although the issue of regulatory

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases: (1) by any applicant for a construction permit or station license whose application is denied ... (2) renewal or modification of any such instrument of authorization ... (3) application for authority to transfer, assign, or dispose of any such instrument of authorization ... (4) applicant for the permit required by section 325 of this title ... (5) holder of any construction permit or station license which has been modified or revoked ... (6) any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in (1)-(4) and (9) ... (7) by any person upon whom an order to cease and desist has been served under section 312, (8) by any radio operator whose license has been suspended by the Commission, and (9) by any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

Id.

²⁷ *Cable Declaratory Ruling*, *supra* note 15, at paras. 4-5; see 47 U.S.C. §230(b)(2) (2000).

²⁸ William T. Lake & Matthew A. Brill, *Jury Still Out on Access to Cable*, FULTON COUNTY DAILY REPORT, July 24, 2000, at 8. Although the Ninth Circuit said in *Portland* that “the FCC has ‘broad authority to forbear from enforcing the telecommunications provisions’ it had decided upon, the commentators noted that “the agency must justify a decision to forbear, and it might be pressed to explain why it should forbear from regulating cable modem service but not competing DSL service.” *Id.*

²⁹ *Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

³⁰ *Id.* at 339.

classification for cable modem service came before the Court, the majority in *Gulf Power* concluded the subject matter of defining the regulatory scheme of cable modem service was “technical, complex, and dynamic; and, as a general rule, agencies have authority to fill gaps where statutes are silent.”³¹ Part IV examines the FCC’s reaction to *Gulf Power* by adopting its *Cable Declaratory Ruling*, finally giving regulatory certainty to the Congressional mandate “to encourage the deployment of advanced telecommunications capability to all Americans” and, if necessary, “to accelerate deployment of such capability by removing barriers to infrastructure investment.”³²

In Part V, this Comment criticizes the Ninth Circuit’s holding in *Brand X* for substituting its own policy preference for Congress’ and the FCC by way of *stare decisis*.³³ This Comment argues that although the Supreme Court granted *certiorari* to the United States Court of Appeals for the Ninth Circuit in *Brand X Internet Services v. FCC*, the Court is unlikely to resolve the current dispute between the Ninth Circuit and the FCC on the merits of the case. Instead the Court will most likely address the “significant conflict in the circuit courts concerning the interaction of the *Chevron* doctrine with the rule of *stare decisis*.”³⁴ Part V argues that the Supreme Court’s decision in *Brand X* will not resolve the foreseeable long-term litigation problems faced by the FCC surrounding emerging technologies, statutory interpretation of the Communications Act, and multi-circuit litigation involving broadband policy.³⁵

In Part VI, this Comment examines the Administrative Orders Review Act

³¹ *Id.* The Court stated that if parts of the 1996 Act were ambiguous, “the FCC’s reading must be accepted nonetheless, provided it is a reasonable interpretation.” *Id.* at 333. Justices Thomas and Souter dissented in *Gulf Power* arguing “the FCC failed to engage in reasoned decision making.” *Id.* at 347.

³² The Telecommunications Act of 1996, Pub. L. No. 104-104, §706(a)-(c), 110 Stat. 153 (note following 47 U.S.C. §157 (2000)) (defining “advanced telecommunications capability” as “high-speed, switched broadband telecommunications”).

³³ See generally *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

³⁴ Appellate Brief for the Federal Petitioners, 2005 WL 122088, at 39, *FCC v. Brand X Internet Servs.*, 2125 S.Ct. 655 (2004) (No. 04-281), *cert. granted*, 125 S. Ct. 655 (2004); see also Ross A. Bunstock & Michael B. Hazzard, *FCC Appeals “Brand X” Decision to Supreme Court*, WOMBLE CARLYLE, at <http://www.wcsr.com/FSL5CS/telecommunicationsmemos> (Sept. 1, 2004) (noting the FCC’s appeal of the *Brand X* decision raises significant legal and policy issues that may be of significant interest to the Supreme Court).

³⁵ *Vonage Holdings Corp. v. Minn. Pub. Utilities Comm’n*, 394 F.3d 568 (8th Cir. 2004) (upholding lower court ruling that the State of Minnesota was prohibited from regulating Internet based phone calling (“voice over the Internet protocol” or “VoIP”) because such service should be properly defined not a telecommunications but rather an information service); see also *In re Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Comm’n*, *Memorandum Opinion and Order*, 19 FCC Rcd. 22404, para. 1 (2004) [hereinafter *Vonage Order*] (preempting state utilities commission from applying its traditional telephone company regulations to VoIP service).

("Hobbs Act"),³⁶ 47 U.S.C. §§402(a), (b) and 28 U.S.C. §2112, which embodies the statutory scheme that provides for judicial review of FCC orders. This present statutory scheme, arguably, gives rise to the same appellate procedural problem that allowed the Ninth Circuit to overrule the FCC's findings in *Brand X*. An aggrieved litigant can invoke Hobbs Act jurisdiction by simply asking a circuit court of appeals to review the FCC's final orders consistent with 47 U.S.C. §402(a).³⁷ At this stage, often time multiple parties file petitions for review in various circuit courts, resulting in venue selection by lottery under 28 U.S.C. §2112's regime.³⁸ Under 47 U.S.C. §402(b), however, the D.C. Circuit has unique statutory competence over communications law and policy based on the sheer number of communications litigants that seek judicial review in its court, which in essence, gives the D.C. Circuit *de facto* primary jurisdiction over communications matters.³⁹ This Comment then analyzes the statutory construction of 47 U.S.C. §402(a) and (b), arguing that Congress intended the United States Court of Appeals for the District of Columbia to have broader jurisdiction over national communications policy against the backdrop of 28 U.S.C. §2112(a)(5).⁴⁰ This Comment concludes that Congress should amend

³⁶ 28 U.S.C. §2342 (1) (2000) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by §402(a).").

³⁷ See generally *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984).

³⁸ *Brand X Internet Servs.*, 345 F.3d at 1127. At this point, the outcome of an FCC order such as the *Cable Declaratory Ruling* is not determinate on the agency's analysis, but rather the chance that the court selected will apply administrative law in a reasonable manner.

³⁹ CHARLES H. KOCH, 3 ADMIN. L. & PRAC. §13.23, n.1 (2d ed. 2004) ("Primary jurisdiction, like exhaustion, allows complex questions to be answered in a uniform manner by one agency, rather than many different courts."). See also *Milne Truck Line, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564, 569, n.4 (9th Cir. 1992) ("The doctrine of primary jurisdiction . . . requires referral to the appropriate administrative body 'whether enforcement of [a] claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [that] administrative body' (quoting *U.S. v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956)). Similar to the doctrine of primary jurisdiction, which promotes uniform legal application, the District of Columbia Circuit has a unique "business" relationship with the FCC and Congress should mandate by statute that this court exercise exclusive jurisdiction on all broadband issues in the first instance. See *supra* text accompanying note 12.

⁴⁰ 28 U.S.C. §2112(a)(5) (2000) (circuit courts of appeals are encouraged to "transfer all proceedings with respect to the order to any other court of appeals for the convenience of the parties in the interest of justice."); see *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004) ("Various CLECs, state commissions, and an association of state utility consumer advocates filed petitions for review in several other circuits; these petitions were transferred to the Eighth Circuit under the random lottery procedure established in 28 U.S.C. §2112(a)(3), and then transferred to this court by the Eighth Circuit under 28 U.S.C. §2112(a)(5)."). It may be unrealistic or inefficient to expect that all judicial matters involving national communications policy will be voluntarily transferred to one appeals court such as the D.C. Circuit as some may counter-argue because either a communications issue af-

47 U.S.C. §402(b), as it begins to rewrite the Telecommunications Act of 1996, and grant the D.C. Circuit exclusive jurisdiction to review administrative decisions and orders involving broadband regulation.⁴¹

II. DEREGULATING "INFORMATION SERVICES" HOLDS THE KEY TO SUCCESS

A. Classifying Communication Services Under the 1996 Act

Congress passed the Telecommunications Act of 1996 in part to encourage innovation while protecting the public from communications markets dominated by monopolies.⁴² The 1996 Act made sweeping changes to the Commu-

fecting national policy may not involve the FCC directly or circuit courts may not be willing to give deference to the D.C. Circuit. *See, e.g., Vonage Holdings Corp.*, 394 F.3d at 569 (stating that a dispute between a state public utilities commission and a private corporation providing interstate VoIP service was not a Hobbs Act petition for review case). *Compare In re 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to §202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking*, 18 F.C.C. Rcd. 13,620 (July 2, 2003), *aff'd in part, rem'd in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 389 n11 (3rd Cir. 2004) (stating that the Deregulatory Petitioners raised threshold argument that previous D.C. Circuit rulings regarding various Media Ownership Rules provided "the law of the case" because FCC "Order results in part from the D.C. Circuit Court's remand in those two decisions;" and holding the law of the case doctrine did not constrain review because "case involve[d] . . . comprehensive reexamination of a larger set of its broadcast ownership rules, in which a different set of parties participated, a different record was compiled, and different results were reached"); *with Fox Television Stations v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (construing the 1996 Act to "carr[y] with it a presumption in favor of repealing or modifying the ownership rules") *amended by*, 293 F.3d 537, 540 (D.C. Cir. 2002) (holding that the FCC had not sufficiently explained its reasons for retaining either the national television owners rule set at 35% by Congress and its cable/broadcast cross-ownership rule after determining that both rules remained "necessary in the public interest"). *See also Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) ("Commission has failed to demonstrate that its exclusion of non-broadcast media in the eight voices exception [to the local ownership rule] is not arbitrary and capricious . . . remand the local ownership rule to the Commission for further consideration.").

⁴¹ 47 U.S.C. §402(b)(1)-(9) (2000). The statute states in relevant part that parties can appeal a Commission order to the United States Court of Appeals for the District of Columbia in nine various instances. Congress amended §402(b) in the 1996 Act which implicated national policy (market entry and competition of local and long distance calling). *See The Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 107, §276 (1996). Section 9 was added to 47 U.S.C. §402 (b) providing the right to appeal exclusively to the D. C. Circuit "by any applicant for authority to provide interLATA services under section 271 of this Act whose application is denied by the Commission." *Id.* §402(b)(9). Congress could again amend 47 U.S.C. §402(b) to include issues pertaining to national broadband policy.

⁴² Robert Cannon, *Where Internet Service Providers and Telephone Companies Compete: A Guide to the Computer Inquires, Enhanced Service Providers and Information Service Providers*, 9 COMMLAW CONSPECTUS 49, 52 (2001) ("The telephone market, as the

nications Act of 1934, amending and modifying certain portions while adding new sections to accommodate technological changes and create a new competitive environment.⁴³ Title I now regulates information and enhanced service providers; common carriers are regulated under Title II; wireless providers under Title III; and cable television companies are regulated as Title VI providers.⁴⁴ Congress charged the Commission with developing a national policy to give all Americans access to Internet broadband services by promoting competition and innovation for the delivery of such services and removing regulatory barriers that discourage infrastructure investment.⁴⁵ Congress made it a primary policy goal for the FCC to write and update a detailed deregulatory framework that implements the basic intent of the 1996 Act.⁴⁶

result of the Telecommunications Act of 1996 is experiencing transformation, moving from a market dominated by monopolies to a market with new entrants bringing new services, new choices and new prices to consumers.”).

⁴³ See 47 U.S.C. §230(b)(2) (2000) (“It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation . . .”); see also Leonard J. Kennedy & Lori A. Zallaps, *If It Ain’t Broke . . . The FCC and Internet Regulation*, 7 COMM.LAW CONSPICUOUS 17, 17 (1999) (“Rather than relying on government regulation to shape the Internet, Congress mandated reliance upon the market.”).

⁴⁴ See generally 47 U.S.C. §§160, 251, 332, 521 (2000); see also PAUL VALLE-RIESTRA, TELECOMMUNICATIONS: THE GOVERNMENT ROLE IN MANAGING THE CONNECTED COMMUNITY, 15-20 (2002). Although the 1996 Act added the distinctive terms such as “telecommunications” and “information” services to the Communications Act, historically, these *regulatory* classifications developed in the mid 1960s. In 1966, as Mr. Valle-Riestra recalls, “the FCC initiated a series of proceedings in order to create regulatory distinctions between the treatment of computers involved in transmitting user messages (*i.e.*, telecommunications services) and the treatment of computers involved in data processing, which the FCC initially termed ‘enhanced’ services.” *Id.* at 18; see also *Cable Declaratory Ruling*, *supra* note 15, at n.139.

These decisions drew a distinction between bottleneck common carrier facilities and services for the transmission or movement of information on the one hand and, on the other, the use of computer processing applications to act on the content, code, protocol, or other aspects of the subscriber’s information. The latter are ‘enhanced’ or information services . . . The Commission has confirmed that the two terms—enhanced services and information services—should be interpreted to extend to the same functions. *Id.*; see generally *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 21905, para. 102 (1996) [hereinafter *Non-Accounting Safeguards Order*]. With this much history, it can be argued that the FCC has been uniquely involved with these regulatory distinction much longer than any *stare decisis* case the Ninth Circuit Court may arbitrarily use to usurp FCC authority.

⁴⁵ *Wireline Broadband NPRM*, *supra* note 10, at paras. 3, 5.

⁴⁶ See *Wireline Broadband NPRM*, *supra* note 10, at para. 4; cf. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 397 (1999) (“Congress is well aware that the ambiguities it chooses to produce in [the 1996 Act] will be resolved by the implementing agency.”); see generally *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The FCC is entitled to considerable deference in its interpretation of provisions of the Commu-

The 1996 Act defines telecommunications service as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁴⁷ Congress differentiated between telecommunications service and telecommunications by defining the latter as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴⁸ In order to differentiate between “telecommunications” and “information service” the Act defines information services as:

The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control or operation of a telecommunications system or the management of a telecommunications service.⁴⁹

These regulatory classifications radically changed the structure and direction of the communications environment, which was already competitive.⁵⁰

Communications technology altered the way we communicate by “improving raw message transmission services (or ‘telecommunications services’) through new technologies . . . as well as in facilitating the provision of enhanced data processing and content services (or ‘information services’) such as voicemail and caller ID.”⁵¹ The FCC’s regulatory classifications are important

nications Act when its interpretation is reasonable and apparent.

⁴⁷ 47 U.S.C. §153(46) (2000).

⁴⁸ *Id.* §153(43) (2000); see *Cable Declaratory Ruling*, *supra* note 15, at para. 40 (“[T]he Act distinguishes ‘telecommunications’ from ‘telecommunications service.’” The Commission has previously recognized that “all information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information. Although the transmission of information to and from these computers may constitute ‘telecommunications,’ that transmission is not necessarily a separate ‘telecommunications service’.”); see also Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, *Order on Remand* (“*Non-Accounting Safeguards Remand*”), 16 FCC Rcd. 9751, para. 16 (“The transmission of information [services] to and from these computers . . . does not alter the form or content of the information . . . [A]s explicitly stated in the statutory definition, [information services are] conveyed ‘via telecommunications’ whether or not the telecommunications component is separately supplied by either the provider or the customer.”); see also Cannon, *supra* note 42, at 50 (“Basic telecommunications services are the offering of pure transmission capacity where the user’s information is transmitted transparently across the network.”).

⁴⁹ 47 U.S.C. §153(20) (2000); see also *Cable Declaratory Ruling*, *supra* note 15, at para. 34.

⁵⁰ Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 COMMLAW CONSPECTUS 37, 38 (1999) (“[T]he Telecommunications Act of 1996 . . . radically restructured the regulatory landscape for the provision of local telephone communications services, attaching significant new consequences to statutory definitions derived from the technologies of the past.”).

⁵¹ VALLE-RIESTRA, *supra* note 44, at 18 (“[W]ith the increasing sophistication and pro-

because each regulated industry operates under vastly different rules.⁵² Telecommunications services, which are subject to Title II common carrier provisions and obligations, are heavily regulated.⁵³ Cable television operators are exempted from Title II regulation as long as they deliver cable services, which include video, data, and voice communications.⁵⁴ The FCC “deliberately structured [a] dualism” regulatory jurisdiction, maintaining “exclusive authority over all operational aspects of cable communication, including technical standards and signal carriage,” while granting state and local government franchise authority.⁵⁵ Legacy regulatory frameworks do not burden information services, which are mutually exclusive from telecommunications services.⁵⁶ Even though “Internet access, like all information services, is provided ‘via tele-

lification of computer applications, it is often difficult to distinguish between telecommunications services, information services, and other types of services.”).

⁵² Christian R. Eriksen, *Cable Broadband: Did the Ninth Circuit Beat the FCC to the Punch in Last Mile Regulation?* 6 TUL. J. TECH. & INTELL. PROP. 283, 283 (2004) (“The classification largely determines what regulatory scheme is applied.”).

⁵³ 47 U.S.C. § 153(46) (2000); see Cannon, *supra* note 42, at 50 (“Enhanced services are not regulated under Title II; rather, they are effectively ‘unregulated’ by the Commission.”). According to Mr. Cannon, enhanced or information services, which Internet services fall under, offer more than telecommunications services. In the former, the “user-supplied information interacts with the services on the network; and there is some degree of computer processing and modification of the user’s information, or the creation of new information in response to user command.” *Id.*

⁵⁴ 47 U.S.C. § 541(c) (2000); see generally James B. Speta, *Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 YALE J. ON REG. 39, 72 (2000) (“[C]able services are exempt from the sort of common carrier, interconnection, and unbundling duties applied to telecommunications carriers.”). Professor Speta analyzed the various Internet platforms available to consumers (wireline, cable, wireless, and satellite) and evaluated the various FCC regulations that could stifle or spur innovation over the broadband technologies. He concluded consumers can benefit the most from adopting the cable broadband access platform and making it “applicable to all carriers deploying broadband information services.” *Id.* at 90. He argues that strong competition among different delivery technologies “that promise to provide the ‘last mile’ of access should not be burdened with interconnection duties that will be unnecessary and unwise.” *Id.* This type of deregulation will permit “consumers to take advantage of new information services in their home.” *Id.* But see Mark A. Lemley & Lawrence Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 971 (2001) (“If one is generally predisposed to keep the government’s hands off the market, this is exactly the wrong way to go about it.”).

⁵⁵ *New York State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 809 (D.C. Cir. 1984). See 47 U.S.C. § 541(a)(2) (2000); see, e.g., Esbin, *supra* note 50, at 83 (“Congress enacted legislation expressly designed to (de) regulate cable television, establish the boundaries of federal, state and local authority over cable systems, and establish franchise procedures and standards to encourage the growth and development of cable system.”). For an excellent analysis of the legislative history behind the Cable Act of 1984, read further Ms. Esbin’s article, as she establishes Congress’ intent to exempt cable services from Title II regulation.

⁵⁶ *In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd. 11830, para. 82 (1998) [hereinafter *Universal Service Report*].

communications,' [such] information service providers are not subject to regulation as common carriers."⁵⁷ Regulating services such as broadband over cable modem has become more complex with the development of new technologies and convergence with older technologies.⁵⁸

B. FCC Reports to Congress on Broadband Deployment

The FCC plays a vital role in implementing congressional mandates, such as broadband deployment, through regulations.⁵⁹ In its *Fourth Report to Congress on the Availability of Advanced Telecommunications Capability in the United States* ("Advanced Telecommunications Report"), the FCC documented "the significant development of new Internet-based services, and new access technology."⁶⁰ The *Advanced Telecommunications Report* found that broadband is being deployed to different parts of the country on a reasonable and timely fashion because of private market mechanisms.⁶¹ In terms of broadband subscribers, the United States has the largest market of absolute numbers, while the United States ranked eleventh overall in residential broadband penetration.⁶² The FCC has achieved its legislative mandate to promote the wide-

⁵⁷ *Id.* at paras. 13, 68. As mentioned earlier in this Comment, the FCC has reached the conclusion in previous reports that "information services are offered 'via telecommunications,' [so therefore] they necessarily require a transmission component in order for users to access information. It is this administrative finding that helped the Commission "find that Internet access services are appropriately classed as information, rather than telecommunications, services." *Id.* at paras. 57, 73.

⁵⁸ Esbin, *supra* note 50, at 42 ("While the Internet arguably represents one form of technological and service 'convergence,' the 1996 Act's deregulatory, pro-competitive program depends upon the viability of distinct regulatory categories for services, facilities, and service providers to establish the rights and obligations of carriers as competition is introduced to formerly monopoly-based markets.").

⁵⁹ See *Advanced Telecommunications Report*, *supra* note 1, at 5.

⁶⁰ *Id.* at 1.

⁶¹ *Id.* at 2-3 (finding a continuing positive trend of having more advanced telecommunications capabilities available to consumers "who stand in particular need of advanced services" such as rural areas, low income, and people with disabilities). One way the Commission can meet the challenge of helping to "deploy and improve advanced services," according to this Report, is by creating "a policy environment that focuses on all broadband access technologies that provide value to consumers." *Id.* at 92.

⁶² *Id.* at 80-81. Although the majority of the Commission championed the growth of nationwide broadband through deregulation, Commissioner Michael Copps dissented from the FCC's approach to broadband deployment. Commissioner Copps found it incredulous that the *Advanced Telecommunications Report* would conclude that Congress's mandate of ubiquitous broadband was being deployed in a timely manner, given America's poor showing in its international ranking. "This Report somehow finds that this is acceptable," Commissioner Copps said of the U.S. being ranked eleventh overall in residential broadband penetration among all nations, "and that our efforts are resulting in timely deployment. I think our efforts are insufficient and that broadband deployment is insufficient." *Id.* at 105.

spread deployment of Internet broadband to most Americans by adopting a market-oriented approach, giving the business sector the regulatory flexibility to bring future innovation, technology, and services to consumers.⁶³

The Commission makes important policy decisions when defining the regulatory classifications in the various communications services because each regulated telecommunications industry operates under vastly different rules.⁶⁴ For example, although the FCC regulates the cable industry under one set of

⁶³ *Id.* at 96. (stating that “across America, the availability of ubiquitous, reliable broadband access is changing the way we work and live.”) (statement of former Chairman Michael K. Powell).

⁶⁴ *E.g.*, Eriksen, *supra* note 52, at 283, 293, n.3 (“Traditionally the telecommunications sector has been the most regulated. Cable has had minimal regulation and information services have had almost no regulation.”); *see also* Lemley and Lessig, *supra* note 54, at 925. Professors Lemley and Lessig argue that the FCC lacks an understanding of the Internet’s architectural end-to-end design. The authors argue that when it comes to the question of “open access” by the cable industry, the FCC “does not adequately evaluate the potential threat that bundling presents to open access to the Internet.” *Id.* Cable companies should not be given special treatment when it comes to open access of the data pipeline to competitors, unlike telephone companies. *Id.* at 928. By taking a “hands off” approach, Professors Lemley and Lessig argue that the FCC’s policies “will ultimately lead to more rather than less regulation,” increasing prices in the broadband market and harming innovation. *Id.* at 925, 951. The authors suggest that every data pipeline into the home should be a shared entrance by all competitors, including the thousands of ISPs. *Id.* at 941. However, such an open doorway provides little incentive for anyone to build faster networks, costing consumers more money. *Compare* Speta, *supra* note 54, at 85, 87 (“Legal rules requiring open access are likely to impose significant costs . . . [O]pen access rules that attempt to mimic perfectly competitive markets may decrease the broadband access provider’s incentives to deploy the platforms in the first instance.”), *with* David McCourt, *The Telecom (Better Late Than Never) Revolution*, WALL ST. J., Jan. 4, 2005, at B8 (stating that the explosion of Internet use via multiple broadband platforms drives residential telecommunications, “making it possible for phone calls, music, movies and Web pages to be delivered over a single network to the home.”) David McCourt argues that, “for such a system to work, the companies that build or own their own networks need to be free to redefine what telecommunications means without running the gantlet of regulation.” By arguing for unregulated “open access,” Professors Lemley and Lessig would compel government-backed regulation enforced by the FCC mandating “open access conditions on cable companies without replicating the complex regulatory scheme.” Lemley and Lessig, *supra* note 54, at 969. Contrary to what the authors suggest, there is a plethora of evidence that innovation and competition for information services continues in a deregulatory environment. *Compare* Jesse Drucker, *Internet Calling May Go Wireless As Cellphone Firms Seek to Tap In*, WALL ST. J., Nov. 9, 2004, at D3 (“[M]ore cellular operators are interested in using cellphones that have Internet calling capabilities, too, via . . . Wi-Fi [technology which] can improve calling quality inside of buildings for less money.”), *with* Almar Latour, *Showdown of the Giants: Verizon, SBC Saddle Up to Compete Head to Head with Cable in TV Service*, WALL ST. J., Nov. 8, 2004, at B1; *see also* Jesse Drucker, Dennis K. Berman, and Peter Grant, *Cable Titans Discuss Offering Cellular Service, Intensifying Foray Into Telecom’s Turf*, WALL ST. J., Nov. 8, 2004, at B1 (“[I]n the war between telephone and cable operators [both] lack one key offering: telephone companies can’t offer video services, and cable companies don’t provide cellular services. To combat those deficits, telephone companies . . . are planning to build fiber-optic networks to bring video to customers.”).

rules when providing video services, the question then becomes what should be the policy and regulation for cable entities that provide broadband delivered through its pipelines. Should cable broadband be classified as a telecommunications, cable, or information service?⁶⁵ Congress did not clearly indicate in the 1996 Act how cable modem service should be classified or regulated.⁶⁶ Regulatory classifications, either by the FCC or the courts, have consequences.⁶⁷ If the FCC classified broadband delivery through cable modem as an interstate information service, such reasoned policy would have national implications. Having multiple parties lend their expertise and opinion to the administrative process would lend credibility and support to the decision making role of the FCC. Likewise, important goals set out by Congress such as the development, investment, and widespread broadband deployment through deregulation would be implemented.⁶⁸

C. Promoting Broadband Competition Through Market Forces

People refer to broadband⁶⁹ almost with religious-like fervor, looking upon

⁶⁵ VALLE-RIESTRA, *supra* note 51, at 19 ("The 1982 consent decree settling the antitrust lawsuit against AT&T distinguished between 'telecommunications' and 'information' services . . . 'Information service' was defined similarly, but slightly more broadly than the FCC's term 'enhanced service'."). According to the author, these regulatory services defined in the AT&T consent decree were adopted by Congress in the 1996 Act. *See generally* U.S. v. AT&T, 552 F. Supp. 131, 179 (D.D.C. 1982), *aff'd sub nom.* Maryland v. U.S., 460 U.S. 1001, (1983); *see also* Cable Declaratory Ruling, *supra* note 15, at n.139.

⁶⁶ Cable Declaratory Ruling, *supra* note 15, para. 32 ("[T]he relevant statutory provisions do not yield easy or obvious answers to the questions at hand; and the case law interpreting those provisions is extensive and complex.").

⁶⁷ Esbin, *supra* note 50, at 39 (asserting the regulatory status of Internet-based services such as broadband over cable "arises as a result of revisions to the definition of 'cable services' contained in the 1996 Act . . . How the FCC resolves issues concerning Internet access and the provision of Internet-based communications services by cable operators has vast implications for both providers and consumers of Internet-based services.").

⁶⁸ *See* THOMAS HAZLETT ET AL., *Sending the Right Signals: Promoting Competition Through Telecommunications Reform*, A Report to the U.S. Chamber of Commerce, Sept. 22, 2004 at pg. 31-32 [hereinafter *U.S. Chamber Report*] (finding that policy changes by the FCC that deregulates the telecommunications sector could lead to a growth in the U.S. economy and jobs market.); *see In re* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 99-251, *Memorandum Opinion and Order*, 15 FCC Rcd. 9816, para. 117 (2000) [hereinafter *AT&T-MediaOne Merger Order*] ("[R]egard[ing] choice among broadband access providers, there is evidence that ILECs, CLECs, and other competitive providers are aggressively rolling out alternative broadband technologies, notwithstanding cable's early lead . . .").

⁶⁹ *Advanced Telecommunications Report*, *supra* note 1, at 10 (defining "advanced telecommunications capability" and "advanced services" as "services and facilities with an upstream (customer-to-provider) and downstream (provider-to-customer) transmission speed of 200 kbps or greater." These facilities and services are referred by the FCC as

it as the next Moses that will lead all who believes to a promised land—a land where people communicate information quickly and inexpensively.⁷⁰ Economists say “the future of the Internet is broadband.”⁷¹ The evolution of advanced communications services largely depends on consumers accessing broadband Internet—a development that could also spur economic growth.⁷² As former FCC Chairman Michael Powell described it, “anybody who cares about the [U.S.] economic well-being . . . has begun to see the critical value of investing in broadband infrastructure and information technologies.”⁷³

A recent independent study released by the United States Chamber of Commerce concluded that an overhaul of telecommunications regulations would encourage capital investment in new high-speed networks, reduce costs, increase productivity and improve service quality for United States based companies.⁷⁴ The impact of deregulating the telecommunications industry could result in a \$634 billion increase in the Gross Domestic Product (“GDP”) and the creation of 212,000 new jobs over the next five years.⁷⁵ Authored by four economists, the study determined that policymakers could approach the growth of broadband from two perspectives: either as a regulatory system that creates uncertainty, or as a market-oriented approach that allows consumers, investors, and innovators to determine the path to be taken.⁷⁶ The study found United States telecommunications to be at a critical juncture and therefore based on their findings, the economists championed a deregulatory path to ubiquitous broadband deployment.⁷⁷ Competition among American businesses

‘broadband,’ which includes various platforms such as wireline, cable, and licensed as well as unlicensed wireless facilities.).

⁷⁰ SHARON E. GILLET ET AL., *Local Government Broadband Initiative*, 28 TELECOMMUNICATIONS POLICY 537, 537-38 (Doug Pitts ed., Elsevier Ltd (2004)) [hereinafter *Local Initiative*].

⁷¹ *Id.* at 537.

⁷² *Id.*

⁷³ Pulver, *supra* note 7, at 22.

⁷⁴ *U.S. Chamber Report*, *supra* note 68, at xix, 85 (concluding that “[u]nder the proposed [deregulatory] reforms, the telecommunications sector—now heavily burdened by regulations, would return to growth.” This conclusion would also be applicable to knowledge-based industries such as technology, healthcare, and education which the study points out “will drive U.S growth and . . . constitute the battleground in global outsourcing . . .”).

⁷⁵ *Id.* at 110. (“The total impact of the telecommunications reforms recommended in this report is the sum of the demand effect of increased capital spending on network assets plus the supply effect of increased productivity growth.”). The authors project that the total impact of deregulatory reforms on capital investment by the telecommunications sector could mean an increase of \$167 billion and another \$467 billion in productivity growth for a total increase to GDP over the next five years at \$634 billion in additional goods and services.) *Id.*

⁷⁶ *Id.* at 111; see also, *Advanced Telecommunications Report*, *supra* note 1, at 46 (“Government policymakers will be challenged to find innovative ways to support private market mechanisms that will deploy and improve advanced services.”).

⁷⁷ *U.S. Chamber Report*, *supra* note 68, at 85.

has increased exponentially, and will continue on an upward trend, because of the rapid development of instantaneous communications.⁷⁸ Investment in information technology since 1995 has resulted in the doubling of United States workers' productivity growth.⁷⁹ American telecommunications systems were structured and limited not long ago, which meant "policymakers imposed stringent regulations on the few companies that delivered narrowly defined services."⁸⁰ Communications technology evolved and converged into a single form of telecommunications, through which previously separate technologies—wire, wireless, cable, satellite, and power utility lines—can now transmit voice, data and video.⁸¹ These technologies compete with one another to deliver various services under this regime to consumers.⁸²

D. Local Government Initiatives Sidestep Federal Regulation

A recent Harris Interactive Incorporated poll found that 156 million Americans are online users either at home, in the office, or at other locations.⁸³ Out of the 73% of adults on the Internet, 44% now use broadband.⁸⁴ Nielsen/Net

⁷⁸ *Id.* at 107; see also *Advanced Telecommunications Report*, *supra* note 1, at 44 ("The continuing deployment of broadband and the development of services that rely upon broadband may thus have a synergistic, mutually reinforcing quality; deployment will likely spur the development of services that, in turn, will spur further deployment.").

⁷⁹ *U.S. Chamber Report*, *supra* note 68, at 107-08.

⁸⁰ U.S. Chamber of Commerce, Summary of Findings, *Sending the Right Signals: Promoting Competition Through Telecommunications Reform*, at 3 (Sept. 22, 2000) (highlighting major points of the full report).

⁸¹ *E.g.*, *In re* Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband Over Power Line Systems, Carrier Current Systems, including Broadband Over Power Line Systems, *Report and Order*, 19 FCC Rcd. 21265, paras. 1, 5 (2004) [hereinafter *BPL Report and Order*] (concluding that Broadband over Power Line ("BPL") could serve as an additional broadband delivery platform, providing "an effective means for "last-mile" delivery of broadband services and may offer a competitive alternative to digital subscriber line (DSL), cable modem services and other high speed Internet access technologies."); see also *Joint Statement on Broadband Over Power Line Communications Services* by Chairman Pat Wood, III, FERC and Chairman Michael K. Powell of the FCC, FCC News, Oct. 1, 2004, at 1 ("[T]he provision of high-speed communications capabilities over utility poles and electric power lines (Access BPL) provides an opportunity to increase the competitive broadband choices that are available to customers and the power supply system management options of utilities.").

⁸² Shawn Young, *All in One: Buying Bundles of Telecom Services Can Make Things Easier—and Cheaper—for Consumers*, WALL ST. J., Sept. 13, 2004, at R6; see also Walter S. Mossberg, *Watching TV on Your Cellphone*, WALL ST. J., Jul. 1, 2004, at D7 ("Not enough TV in your life? Well, now you can stay tuned . . . thanks to your cellphone . . . While the idea of watching TV on a wireless phone is new in the U.S., it's old hat in some other countries.").

⁸³ Lawrence Rout, *Broadband: Online Audience Grows—from Different Directions*, WALL ST. J., Sept. 13, 2004, at R2.

⁸⁴ *Id.*

Ratings research from July 2004 found that “[t]he percentage of U.S. Internet users connecting from home using broadband surpassed the percentage that use narrowband connection” or dial-up.⁸⁵ Presently, 63 million people surf the Web through broadband, compared to 61.3 million using dial-up services. Broadband connections from the home accounted for 51% of Internet users in July 2004, compared with 38% of home Internet broadband users in the previous year.⁸⁶

Although the FCC found in the *Advanced Communications Report* that subscription to high-speed services were reported in 93% of all U.S. zip codes,⁸⁷ many local governments are not waiting for the private sector or federally imposed mandates to get their community wired.⁸⁸ Local government policymakers have looked at various initiatives to provide advanced communications services to their community.⁸⁹ Proposed ideas to stimulate demand for local broadband services include local governments: (1) playing the role of buyer, facilitator, or lead user; (2) adopting policy reforms that reduce cost and time constraints required for private-sector deployments; (3) being used as a financial incentive source to stimulate broadband; and (4) stimulating broadband deployment by developing their own municipal infrastructure network.⁹⁰ Implementation of these ideas would result in availability, choice, quality, and lower pricing.⁹¹

Danville, Virginia is one example of a local government using all four initiatives with promising and successful results.⁹² As *USA Today* reported, the town of 48,000 people had lost 7,500 textile jobs to modernization and off-shore cheap labor.⁹³ Another community economic anchor — tobacco — had also suffered market losses. Both economic downturns resulted in few jobs:

That’s when Danville decided to grab fate by the throat. The result: Danville, a high-

⁸⁵ Vauhini Vara, *High Speed Surpass Dial-Up As Top Home Web Access in U.S.*, WALL ST. J., Aug. 18, 2004 at D4.

⁸⁶ *Id.* (stating that one reason for an increase in consumer use of high speed broadband services over dial-up can be attributed to popular applications that require a faster Internet pipeline, such as interactive videogames and music streaming. The author suggests that it is the commercial use of the broadband application, not government forced regulation that is helping to “clos[e] the gap with other countries where broadband usage is high.”). *Cf. Advanced Telecommunications Report*, *supra* note 1, at 43, 44 (“Government support is also a driver of broadband development. In [South Korea, and Canada—which lead the world in broadband penetration levels, as well as Japan, and the U.S.] the government provides some form of support for broadband service.”).

⁸⁷ *Advanced Telecommunications Report*, *supra* note 1, at 30.

⁸⁸ *See Local Initiative*, *supra* note 70, at 539.

⁸⁹ *Id.*

⁹⁰ *Id.* at 540-48.

⁹¹ *Id.* at 557.

⁹² Leslie Cauley, *Small Towns Tired of Slow Rollout Create Own High-Speed Networks*, USA TODAY, Sept. 22, 2004, at B1.

⁹³ *Id.*

octane, business-class fiber-optic network capable of delivering voice, data, and video services. The system is being built in phases with help from World Wide Packets, a company that specializes in municipal networks. The state-of-the-art workhorse offers speeds up to 1 gigabit in both directions . . . 'We used to have to beg business to locate here. Now our phones are ringing off the hook,' Mayor Tom Hamline says.⁹⁴

Although local governments providing advanced telecommunications services may be a new phenomenon, more towns across America are building their own networks out of frustration over sluggish broadband rollout.⁹⁵ The success of these projects is due in part to little regulation.

III. MULTIPLE CIRCUIT COURTS ATTEMPT TO DEFINE CABLE MODEM SERVICE

Traditionally, cable television services provided one-way video programming from network to subscriber.⁹⁶ Prior to the 1996 Act, cable operators had begun to transmit conventional video programming to subscribers, as well as non-video communications (or data transmissions) to school districts, fire departments, police stations, and libraries using coaxial and fiber optic cables.⁹⁷ Despite some sporadic expansion of two-way communications services, cable entities providing broadband services remained relatively new until passage of the 1996 Act.⁹⁸ Although cable systems typically have been municipally franchised, there has existed a coordination of federal, state, and local authority.⁹⁹

Under the 1996 Act, local governments, for example, can regulate cable services up to a point. Congress specifically recognizes the power of local franchising authorities to preserve competition for cable services¹⁰⁰ or to exercise

⁹⁴ *Id.*

⁹⁵ See *Local Initiative*, *supra* note 70, at 538-39.

⁹⁶ *Cable Declaratory Ruling*, *supra* note 15, at para. 12; see also Brief of Intervenor WorldCom, Inc. et al. at 3, *Brand X Internet Servs. v. FCC* 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 655 (2004).

⁹⁷ *Tex. Utilities Elec. Co. v. FCC*, 997 F.2d 925, 927-28 (D.C. Cir. 1993) (holding FCC interpretation of the Pole Attachment Act, passed by Congress authorizing the FCC to regulate rates assessed by utilities for any attachment by a cable television system to their poles, included commingled services. The Court of Appeals for the District of Columbia Circuit found the FCC interpretation of an ambiguous provision of the Pole Attachment Act subject to its authority reasonably interpreted the statute); see 47 U.S.C. §224(a)-(b) (2000); see also *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power*, 534 U.S. 327, 330 (2002) (finding the FCC continued to have jurisdiction to regulate the rates, terms, and conditions for pole attachments).

⁹⁸ *Local Initiative*, *supra* note 70, at 537.

⁹⁹ *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1152 (D. Or. 1999) (finding prior to the FCC asserting jurisdiction over cable broadcasting in the mid-1960s, local governments had been regulating cable companies) *rev'd on other grounds*, 216 F.3d 871 (9th Cir. 2000); see also *Midland Telecasting Co. v. Midessa Television Co.* 617 F.2d 1141, 1146 (5th Cir. 1980).

¹⁰⁰ 47 U.S.C. §533(d)(2) (2000) ("Any State or franchising authority may not prohibit

authority over matters regarding public health, safety, and welfare.¹⁰¹ But the extent of power a local franchise authority would have on cable modem service providers would depend on whether such service can be defined as cable, telecommunications, or information service.¹⁰² The FCC launched a notice of inquiry beginning in 1998 on the type of regulatory treatment cable modem services merited under the Act,¹⁰³ and the issue continued to arise under various proceedings, including one complaint from an Internet Service Provider ("ISP")¹⁰⁴ and several license transfers involving cable mergers.¹⁰⁵

the ownership of control of a cable system by any person ... Nothing in this section shall be construed to prevent any State or franchising authority from prohibiting the ownership or control of a cable system in a jurisdiction by any person . . . (2) in circumstances in which the State or franchising authority determines that the acquisition of such a cable system may eliminate or reduce competition in the *delivery of cable service* in such jurisdiction.") (emphasis added).

¹⁰¹ 47 U.S.C. §556(a) (2000) (stating that it must be consistent with the express provisions of this title); see also 47 U.S.C. §556(c) (2000) (stating that "except as provided in section 557, any provisions of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.").

¹⁰² See *Wireline Broadband NPRM*, *supra* note 10, at para. 4 ("Current networks and technologies that enable the end-user to engage in broadband capabilities are evolving and that the infrastructure of today may be insufficient to support the applications of tomorrow. Therefore, the Commission should avoid policies that have the unintended consequence of embracing too quickly any one technology or service.").

¹⁰³ See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Notice of Inquiry*, 13 FCC Rcd. 15280, paras. 77-82 (1998) [hereinafter *Advanced Telecommunications NOI*]; see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report to Congress [hereinafter *First 706 Report*], 14 FCC Rcd. 2398, paras. 100-01 (1999) ("We note, as a preliminary matter, that our duty to encourage broadband deployment of advanced services requires us to look broadly at all methods of providing additional bandwidth to customers, not just those methods provided by cable companies or other particular types of service providers."). Although the FCC acknowledged a sparse record at that time, the *First 706 Report* found consumers would soon have a broad range of broadband choices, thanks to emerging technologies. The Commission felt at that time, arguably correct, that based on projected innovative broadband deployment, there was no reason to impose heavy regulation.

¹⁰⁴ See *In re Internet Ventures, Inc., Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, *Memorandum Opinion and Order*, 15 FCC Rcd. 3247 (2000) [hereinafter *Internet Ventures*] (seeking FCC ruling that ISPs were entitled to leased commercial access under Section 612 because ISPs such as *Internet Ventures* were providers of video programming). The FCC did not address issues raised by filed comments such as "mandatory ISP access to cable operators' broadband facilities, and whether Internet access provided by a cable system constitutes 'cable service,' 'telecommunications,' or an information service.'" *Id.* at para. 11. Rather, it narrowly addressed the threshold issue raised by the petition: "does ISP Internet access service, such as that pro-

Despite a congressional mandate to deploy advanced telecommunications capability on a reasonable and timely basis under the 1996 Act, the FCC, by its own admission, dragged its feet for several years, refusing to "determine a regulatory classification for, or to regulate cable modem service on an industry-wide basis."¹⁰⁶ The FCC's inaction gave several federal courts the opportunity to regulate national communication policy.¹⁰⁷ This type of multi-district litigation resulted in regulatory uncertainty.

vided by [petitioner] constitute video programming contemplated under Section 612 of the Act?" *Id.* at para. 12.

¹⁰⁵ See *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. Transferors, to AOL Time Warner Inc., Transferee, Memorandum Opinion and Order*, 16 FCC Rcd. 6547 (2001) [hereinafter *AOL Time Warner Merger*]. The Applicants argued that the FCC should not impose open-access conditions to the cable pipeline for independent ISPs wanting to provide alternative Internet service because "this case is indistinguishable from prior cases such as AT&T-MediaOne in which the Commission declined to require AT&T to open its cable networks to unaffiliated ISPs." *Id.* at para. 53. The Applicants tried to make the case that imposing an access condition in the *AOL Time Warner Merger* would be "inconsistent with the Commission's pending Notice of Inquiry on high-speed Internet access." *Id.*; see also *Cable Access NOI*, *infra* note 257. AOL's argument fell on deaf ears. The FCC pointed out that AOL "had been the leading advocate and supporter of the 'open access' movement" and the combination of AOL purchasing Time Warner, as the second largest cable system, could give it an "ability to discriminate against unaffiliated ISPs." *AOL Time Warner Merger*, *supra* note 105, at paras. 54, 87. The Commission reminded the Applicants that previous mergers "involved a comparable combination of assets or a comparable potential impact on competition among broadband ISPs." *Id.* at para. 55. Additionally, the FCC pointed out the *Cable Access NOI* dealt with issues affecting the whole industry, while the AOL-Time Warner merger would place the new company "in a unique position that may justify conditions inapplicable to other." *Id.* at para. 55; see also *AT&T-MediaOne Merger*, *supra* note 68. During the AT&T-MediaOne merger review, AT&T made several open-access commitments to the FCC granting unaffiliated ISPs a pipeline to the merged companies' cable modem platform. *Id.* at para. 121 ("AT&T and MediaOne have also agreed to negotiate, upon the expiration of their exclusive arrangement with Excite @ Home and Road Runner, private contracts with multiple ISPs in order to offer those ISPs reasonably comparable access prices.").

¹⁰⁶ *Cable Declaratory Ruling*, *supra* note 15, at para. 2. Although Congress mandated a policy for a ubiquitous broadband deployment, the FCC conducted several inquiries and rulings, yet the Commission could not arrive at a policy determination until 2002. See *supra* notes 48, 56, 68, & 103-105 and accompanying text; see also *Nat'l Cable & Telecomm. Ass'n, Inc. v Gulf Power*, 534 U.S. 327, 351-53 (2002) (Thomas, J., dissenting) ("The FCC has not represented to this Court that high-speed Internet access provided through cable wires is not a telecommunications service. To the contrary, it has made its agnosticism on the topic quite clear.").

¹⁰⁷ See Lake and Brill, *supra* note 28, at 8.

A. Establishing Cable Modem Broadband Policy Before the FCC Reaches a Conclusion

1. District Court Ruling Under *AT&T Corp. v. City of Portland*

The FCC's legal setbacks in setting a national broadband policy trace back to AT&T's 1999 acquisition of Telecommunications Inc. ("TCI").¹⁰⁸ The long distance telephone giant aspired to offer consumers local phone service over cable lines using the high-speed Internet platform. Most telecommunications industry analysts concluded a merger between the two companies would "be the first serious competition for regional Bell phone companies."¹⁰⁹ In order to establish itself as a broadband powerhouse, AT&T began to acquire interest in the cable industry.¹¹⁰ In the summer of 1998, AT&T and TCI announced their intent to forge ahead with the "the ultimate deal."¹¹¹ The merged companies sought approval from three regulatory entities—the Department of Justice ("DOJ"), the FCC, and local governments. Both the DOJ and the FCC completed a review of the merger and approved it. The DOJ gave its antitrust blessings to the deal once TCI sold its wireless business interest in Sprint PCS.¹¹² The Commission in turn, analyzed the AT&T proposed transfer of licenses and authorizations controlled by TCI under the standard public interest review, balancing the concerns raised by interested parties such as residential Internet access with the potential consumer benefits.¹¹³ Once it completed its review of TCI's federal license transfers to AT&T, the FCC concluded the record did not support any requests by ISPs to impose open access or forced access requirements upon AT&T.¹¹⁴

¹⁰⁸ Mike McDaniel, *AT&T, TCI Agree to Bold Buyout Plan*, HOUSTON CHRONICLE, June 25, 1998, at A1 ("Bypassing local-phone wires, AT&T's challenge to the Baby Bell regional companies points to a future in technology that could eventually converge conventional phones, televisions and Internet services.").

¹⁰⁹ *Id.*

¹¹⁰ Steve Rosenbush et al., *AT&T to Purchase TCI \$30 Billion Deal Will Upend Phone, Cable Industries*, USA TODAY, June 24, 1998, at A1. One of the major investment problems AT&T would face in buying a company like TCI would be to overhaul the cable operations system that support two-way traffic, requiring a financial commitment to expand the broadband infrastructure.

¹¹¹ *Id.* (quoting Brian Roberts, CEO of cable company Comcast). One of the reasons why this \$30 billion merger made so much business sense was TCI's major interest in the @Home Internet service for cable modems.

¹¹² *AT&T Corp. v. City of Portland*, 216 F.3d 871, 874 (9th Cir. 2000); see *United States v. AT&T Corp., Telecomm. Inc.* No. CIV. 98 CO03170, 1999 WL 1211462 (D.D.C. 1999) (final judgment).

¹¹³ See *In re Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from TCI to AT&T*, *Memorandum Opinion and Order*, 14 FCC Rcd. 3160, para 1. (1999) [hereinafter, *AT&T-TCI Merger*].

¹¹⁴ *Id.* at paras. 94-96.

Officials from the City of Portland held public hearings in the fall of 1998 to discuss the regulatory treatment of cable modem services in light of the proposed AT&T/TCI merger.¹¹⁵ Several parties argued to the regulatory commission advising city officials, that the AT&T/TCI merger would have a detrimental effect on local cable services by monopolizing “the local retail market for residential Internet access services.”¹¹⁶ Portland arrived at two conclusions: (1) AT&T’s cable modem platform “had no viable competitors in the local retail market for residential Internet access service” and (2) the city should regulate AT&T’s broadband service “as an ‘essential facility’ to protect competition.”¹¹⁷

The Portland officials believed that “[s]o long as cable modem services are deemed by law to be ‘cable services’ as provided under Title VI of the Com-

¹¹⁵ *AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1150 (D. Or. 1999), *rev’d*, 216 F.3d 871, 874 (9th Cir. 2000).

¹¹⁶ *Id.* at 1150. Unaffiliated Internet Service Providers argued that the merger would give cable subscribers limited choices in Internet services. ISPs claimed that without access to the cable system pipeline, they couldn’t compete with AT&T’s @Home cable modem platform and therefore “would be driven out of business, eliminating several hundred jobs, and costing the local economy \$20 million.” *AT&T Corp.*, 43 F. Supp. 2d at 1150. Neither the regulatory commission, city officials, nor the district court gave ample evidence for such a dramatic conclusion. This consumer welfare concern was raised by US West, the incumbent local telephone exchange carrier who stood to lose its customer base if AT&T began offering voice services. Of course, the “economic injury” testimony was an onerous legal finding by the Portland city officials because the Department of Justice had approved the merger on an antitrust ground; see *AT&T Corp., TCI, Inc.*, 1999 WL 1211462, at 7. As the Appeals Court later asserted, there are other ways for consumers to get high-speed Internet access in the home, such as digital subscriber lines (“DSL”), fixed wireless providers, and satellite providers. *City of Portland*, 216 F.3d at 874.

¹¹⁷ *AT&T Corp.*, 43 F. Supp. 2d at 1150. An “essential facility” is an antitrust term which means a facility that competitors cannot practically duplicate and that otherwise is unavailable because the “monopolist” refuses to make the facility available to another party. See generally *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). This type of refusal may violate antitrust laws because a monopolist’s control over an essential facility (called a “bottleneck”) can extend from one stage of production to another, and from one market into another. Compare *Otter Tail Power Co. v. U.S.*, 410 U.S. 366, 377 (1973) (“The record makes abundantly clear that Otter Tail used its monopoly power in the towns in its service area to foreclose competition or gain a competitive advantage, or to destroy a competitor, all in violation of the antitrust laws.”) with *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (Although plaintiff won at trial arguing his case under essential facilities, the High Court did not rely on the “essential facilities” doctrine to affirm jury’s conclusion.). See also *Verizon Comm. Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004) (“We have never recognized such a doctrine and we find no need to either recognize it or to repudiate it here.”). Although the Court did not apply the essential facilities doctrine in *Verizon*, it took notice that for anyone to invoke such doctrine, an “indispensable requirement” element would be needed for a litigant to argue “the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.” *Id.* The Court pointed out that such claims cannot be made when a federal agency, such as the FCC, has jurisdiction to regulate and compel open access. *Id.*

munications Act of 1934," cable modem services could be regulated under its jurisdiction.¹¹⁸ It should be noted that the Communications Act is ambiguous when it comes to the regulatory scheme of cable modem services. Despite this onerous classification, the Portland city officials conditioned the merger on open-access to independent Internet Service Providers (ISP's).¹¹⁹ Portland argued to the district court that cable modem regulation should be classified under Title VI as a cable service, having therefore full authority and jurisdiction to mandate such conditions on AT&T/TCI's license and franchise agreement transfers.¹²⁰

In the meantime, AT&T did not argue cable modem broadband services should be regulated under the deregulatory Title I information service rather than under Title VI regulatory cable services. Instead, the company argued federal preemption under the Communications Act.¹²¹ The District Court read the law incorrectly because instead of writing in its opinion "which is inconsistent *with this Act*" found in the statute, it read 47 U.S.C. §556 to say "which is inconsistent *with this chapter*."¹²² In its analysis, the court found that Congress "intended to interfere as little as possible with existing local government authority to regulate cable franchises" and that "courts had long recognized a city's power to promote competition in the local economy."¹²³ The court stated that if Congress wanted to preempt the authority of a local franchise over cable, "[it] must make its intent 'unmistakably clear' in the statute's wording."¹²⁴ Perhaps the court should have read the statute more closely since Congress

¹¹⁸ *AT&T Corp.*, 43 F. Supp. 2d at 1150.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1150.

¹²¹ *Id.* at 1151. See 47 U.S.C. §556(c) (2000) ("Any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act, shall be deemed to be preempted and superseded.").

¹²² *AT&T v. City of Portland*, 43 F. Supp. 2d at 1151 (emphasis added). If the District Court had read the statute correctly, it would have to read the entire Act, finding the City's "[o]rdinance is preempted by several provisions of Title VI of the Communications Act, which was enacted among other reasons, 'to establish a national policy concerning cable communications' and to ' . . . minimize unnecessary regulation that would impose an undue economic burden on cable systems'" under 47 U.S.C §§521(1), (6). *MediaOne Group Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000), *aff'd* 257 F.3d 356 (4th Cir. 2001). Congress's telecommunications policy was intended to create a communications environment "that preserves the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by *Federal or State regulation*" under 47 U.S.C. §230(b)(2) (emphasis added). *Id.* quoting 47 U.S.C. §230(b)(2) (2000). It is worth noting that the district court relied on Barbara Esbin, *supra* note 50, to inform itself on the benefits that cable modem broadband holds for both consumers and the communication industry. See *AT&T v. City of Portland*, 43 F. Supp. 2d at 1149-50.

¹²³ *AT&T v. City of Portland*, 43 F. Supp. 2d at 1151-52.

¹²⁴ *Id.* at 1152.

explicitly preempted municipalities under §556(c) from exerting franchise authority if their actions were inconsistent with the Communications Act. The district court granted summary judgment to the City of Portland, giving it the authority to condition the transfer of control of TCI's cable licenses to AT&T upon the company opening its Internet cable facilities to competing ISPs.¹²⁵

2. Ninth Circuit Ruling in *AT&T Corp. v. City of Portland*

AT&T appealed the case to the United States Court of Appeals for the Ninth Circuit challenging the City of Portland's authority to condition the transfer of federal licenses upon opening its cable modem platform to unaffiliated ISPs.¹²⁶ The question before the court was straightforward: "whether a local cable franchising authority may condition a transfer of a cable franchise upon the cable operator's grant of unrestricted access to its cable broadband transmission facilities for Internet service providers other than the operator's proprietary service."¹²⁷ The Commission, authorized by Congress to develop national communications policy, filed an *amicus curiae* brief addressing the various issues raised by the parties in the district court: 1) why the FCC did not condition the AT&T-TCI merger by imposing an open access requirement after evaluating the competing arguments and 2) why the Commission may preempt local government regulation that conflicts with federal policy such as an open access requirement on broadband over cable systems.¹²⁸

The FCC gave the Ninth Circuit panel a brief tutorial on the merits behind regulatory restraint over computer data services.¹²⁹ The Commission's brief described to the court how Congress intended the FCC to make advanced services available to all Americans through regulatory forbearance over Internet broadband.¹³⁰ The court was given sufficient analysis on how the FCC determined Congress' goal of widespread broadband deployment thus far and why regulatory intervention in the high-speed Internet service market was not necessary.¹³¹ As to the merits of the case, the Commission pointed out the fact that it had approved the AT&T-TCI merger without imposing any open access re-

¹²⁵ *Id.* at 1156.

¹²⁶ *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

¹²⁷ *Id.* at 872.

¹²⁸ Brief Amicus Curiae Federal Communications Commission at 11-15, 16, 27, *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609) [hereinafter *FCC Amicus Curiae*].

¹²⁹ *Id.* at 3.

¹³⁰ *Id.* at 5.

¹³¹ *Id.* at 8-9 (stating several parties had advocated for open access requirements, but the record compiled by the *First 706 Report* indicated a market-oriented approach encouraging multiple broadband platforms would served consumers best); see *First 706 Report*, *supra* note 103, at 101.

quirements based on the record compiled during the merger process.¹³² Just as AT&T had argued before a trial judge, the Commission gave the Ninth Circuit its analysis on local franchising authorities imposing open access requirements of cable companies.¹³³ The FCC tried to correct the trial record by stating that the litigants below had “premised their arguments in this case on [the] faulty legal assumption,” that cable broadband was regulated as a cable service.¹³⁴ The FCC agreed that Congress was vague on its regulatory intent for broadband services over cable and the Commission had yet to resolve the matter.¹³⁵

The Commission reminded the court that Congress authorized an administrative agency experienced in telecommunications policy with the sole “responsibility for the monitoring and advancement of national broadband policy.”¹³⁶ The FCC argued that it alone had “jurisdiction over all of the current providers of broadband technology [while] [l]ocal franchising authorities, in contrast, are in no position to implement technologically-neutral policies with respect to all these competitors.”¹³⁷ The FCC pleaded with the court for “a narrow judicial resolution of the dispute.”¹³⁸

The court’s opinion started off with boilerplate concerns, such as “this is a struggle over access to cable broadband technology . . .” and stating that several parties to the case “forcefully urge us to consider what our national policy should be concerning open access to the Internet. However, that is not our task, and in our quicksilver technological environment it doubtless would be an idle exercise.”¹³⁹ The analysis began by considering whether the AT&T cable broadband platform Excite@Home was a “cable service” as defined by Congress in the 1996 Act.¹⁴⁰ Under the court’s statutory interpretation, it was not.

¹³² *FCC Amicus Curiae*, *supra* note 128, at 13-15.

¹³³ *Id.* at 19.

¹³⁴ *Id.*

¹³⁵ *Id.* at 19, 26 (“To date, the [FCC] has not decided whether broadband capability offered over cable facilities is a ‘cable service’ . . . or instead should be classified as ‘telecommunications’ or as an ‘information service.’ The answer to this question is far from clear.”); *see also* AT&T v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000).

¹³⁶ *FCC Amicus Curiae*, *supra* note 128, at 13-15.

¹³⁷ *Id.* at 29 (“In the absence of express statutory preemption, the FCC may preempt local cable regulation that conflict with federal policy, so long as the Commission acts, ‘within the scope of its congressionally delegated authority.’”) (quoting *City of New York v. FCC*, 486 U.S. 57 (1988)).

¹³⁸ *FCC Amicus Curiae*, *supra* note 128, at 29, 30 (“Ultimately, given the rapidly evolving technologies involved here, the Court should proceed with caution when it resolved this case.”).

¹³⁹ *City of Portland*, 216 F.3d at 873, 876.

¹⁴⁰ *Id.* at 876 (“Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and chart a course by the law’s words.”). It’s not clear whether the court attempted to reach a conclusion based on the metaphysical aspect of the law, something Heraclitus might have argued for as a 21st century litigant. But, the court did state that it would look to the plain language

Cable service was a one-way transmission of programming to subscribers, while Internet access involves two-way information exchange beyond subscriber interaction.¹⁴¹ The court stated that the 1996 Act does not allow a cable company to operate without local government franchise authority, but cable modem services provided by AT&T are not cable services, and therefore Portland may not directly regulate them through its franchise authority.¹⁴²

The case should have been over and done with at that point because the issues raised at trial had been addressed with a narrow judicial resolution. After all, the FCC had reviewed the merger and the court concluded Portland had no cable service franchise authority.¹⁴³ However, due to the Ninth Circuit's propensity for playing both judicial and legislative roles, and the absence of an FCC explicit position regarding the regulatory classification of high-speed Internet services, the court adopted its own broadband policy. The court declared that "although we conclude that a cable operator may provide cable broadband Internet access without a cable service franchise, we must determine whether Portland may condition AT&T's provision of standard cable service upon its opening access to the cable broadband network for competing ISPs."¹⁴⁴

of the entire Communications Act, "including object and policy." *Id.* It appears the Ninth Circuit Court may have proved Heraclitus' philosophy to be correct, since they were briefed by the FCC on the object and policy of the 1996 Act, yet they refused to give deference. *See id.* ("We note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us."). *But see supra* text accompanying notes 128-138. Compare with James Fieser, Ph.D., *Heraclitus: The Internet Encyclopedia of Philosophy*, University of Tennessee at Martin, at http://www.luc.edu/faculty/meppers/courses/192_Science_Religion_Society/documents/04_Heraclitus.pdf (Mar. 31, 2005) (quoting Heraclitus as saying "men always prove to be uncomprehending, both before they have heard it and when once they have heard it.").

¹⁴¹ AT&T Corp. v. City of Portland, 216 F.3d 871, 876 (9th Cir. 2000).

The Act defines 'cable service' as '(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.' 47 U.S.C. §522(6). For the purposes of this definition, 'video programming' means 'programming provided by, or generally considered comparable to programming provided by, a television broadcast station,' 47 U.S.C. §522(20), and 'other programming service' means 'information that a cable operator makes available to all subscribers generally,' 47 U.S.C. §522(14). The essence of cable service, therefore, is one-way transmission of programming to subscribers generally.

Id. The court also concluded that "applying carefully tailored scheme of cable television regulation to cable broadband would lead to an absurd result." *Id.* at 877. It is worth noting that the Ninth Circuit credited the expertise analysis of this conclusion to the Circuit Court of Appeals for the District of Columbia. *See NCTA v. FCC*, 33 F.3d 66 (D.C. Cir. 1994). This supports the argument that the D.C. Circuit is seen among other courts as an expert in telecommunications law and policy.

¹⁴² *City of Portland*, 216 F.3d at 877; *see also* 47 U.S.C. §541(b)(1) (2000).

¹⁴³ *City of Portland*, 216 F.3d at 879

¹⁴⁴ *Id.* at 877.

The three-judge panel took it upon itself to determine the regulatory scheme of broadband over cable within the context of the 1996 Act, despite the fact that neither Congress nor the FCC had done so.¹⁴⁵ The Ninth Circuit held that cable modem service was a hybrid formulation—partly an information service and partly a telecommunications service.¹⁴⁶ Because the Act prohibits local governments from regulating telecommunications service, “Portland may not condition the transfer of the cable franchise on nondiscriminatory access to AT&T’s cable broadband network.”¹⁴⁷ The court completely disregarded previous findings by the FCC when it concluded that the definition of “information service” and “telecommunications service” under the Telecommunications Act of 1996 established mutually exclusive categories of service “when an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ . . . it offers an ‘information service’ even though it uses telecommunications to do so.”¹⁴⁸ Although several parties to this case “hailed the decision,” this holding was a time bomb waiting to explode.¹⁴⁹

B. Any Authority Inconsistent With the Communications Act Shall be Deemed Preempted

1. District Court Findings in *MediaOne Group and AT&T Corp. v. County of Henrico*

Nearly a year after the United States District Court for the District of Oregon decided that federal preemption under the Communications Act would not prevent Portland from regulating cable modem broadband as a cable service, the same issue and the same plaintiff litigant came before the United States District Court for the Eastern District of Virginia.¹⁵⁰ Just like its acquisition of TCI Cable, AT&T continued its cable industry shopping spree in 1999, spend-

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 878.

¹⁴⁷ *Id.* at 880 (“We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act.”).

¹⁴⁸ *Universal Service Report*, *supra* note 56, at para. 39; *see also Non-Accounting Safeguards Remand*, *supra* note 48, at para. 36.

¹⁴⁹ Reed Business Information, *DOJ Wants Freedom for Broadband*, at www.americasnetwork.com/americasnetwork/article/articleDetail.jsp?id=121627 (Sept. 9, 2004).

¹⁵⁰ *See generally MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000), *aff’d*, 257 F.3d 356 (4th Cir. 2001).

ing \$58 billion to buy MediaOne Group, Inc.¹⁵¹ In May, AT&T and MediaOne agreed to merge, giving the phone giant control of additional cable assets, including MediaOne's cable system in Henrico County, Virginia.¹⁵² Similar to the interests involved in the TCI buyout, MediaOne Group, Inc. provided traditional cable services along with an upgraded cable modem platform and a stake in Road Runner, once a provider of Internet access over cable.¹⁵³ The company provided bundled high-speed Internet access using MediaOne's broadband pipelines with Internet connectivity traditionally served by unaffiliated ISPs.¹⁵⁴

AT&T filed an application with the Henrico County Board of Supervisors seeking to transfer MediaOne's cable carriage rights.¹⁵⁵ Once again, the county held public meetings and hearings, concluding a transfer of control could take place under one condition: that the merged company "provides any requesting Internet Service Provider access to its cable modem platform (unbundled from the provision of content)" at wholesale rates.¹⁵⁶ If AT&T did not meet the re-

¹⁵¹ Rebecca Blumenstein & John R. Wilke, *AT&T Deal for MediaOne Moves Ahead*, WALL ST. J., May 26, 2000, at A3.

¹⁵² *Id.*; cf. *MediaOne Group*, 97 F. Supp. 2d at 713 (pointing out that "MediaOne's cable system in Henrico includes a 'cable modem platform' which can be used to provide high-speed, two-way connection to the Internet . . . [a] cable modem platform [that] has an 'always on' connection that allows users such benefits as . . . information without first dialing up.").

¹⁵³ *AT&T: What Victory Means*, BUS. WEEK, May 17, 1999, at 34. MediaOne was involved in several partnerships, which included a significant interest in Road Runner. AT&T inherited from MediaOne a 25% interest in Time Warner Entertainment ("TWE"), a subsidiary of Time Warner ("TW"). MediaOne's interest included most of TW's cable system. Along with a partnership in cable systems, Time Warner had 40% co-controlling interest in Road Runner.

¹⁵⁴ Kent Morlan, *MediaOne Group v. County of Henrico, Virginia*, MoreLaw.com, at <http://www.morelaw.com/verdicts/case.asp?n=00-1680,+00-1709,+00-1719&s=VA&d=15277> (July 11, 2001). Unlike its merger with TCI, AT&T/MediaOne faced a tougher sell to the federal regulators. AT&T had to sell its interest in other cable systems, but concerns were raised about AT&T stake in both Road Runner and Excite@Home Corp. ("@Home"). Both Internet providers were major rivals, and the government worried "the combination could have stifled competition in the emerging market" for Internet access over cable line. See Blumenstein & Wilke, *supra* note 151, at A3. The FCC required AT&T to select one of three video condition compliance options consisting of (a) a divestiture in TWE interest, (b) terminating "its involvement in TWE's video programming activities," or (c) divesting its interest in other cable systems. *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee, Memorandum Opinion and Order*, 15 FCC Rcd. 9816, at para. 4 (2000) [hereinafter *AT&T-MediaOne Merger Order*]. The Justice Department, however, did not require AT&T to get rid of its interest in Road Runner until 2002 due to a business partnership agreement. See *United States v. AT&T Corp., and MediaOne Group, Inc.*, No. CIV. A. 1:00CV01176 RLC, 2000 WL 1752108, at *3 (D.D.C. Sept. 27, 2000) (final judgment).

¹⁵⁵ *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 713 (E.D. Va. 2000).

¹⁵⁶ *Id.* at 714.

quirement within a year, the transfer of control would be denied.¹⁵⁷

AT&T and MediaOne asked the court to permanently enjoin Henrico County from enforcing its ordinance, arguing federal law preempted Henrico's local authority.¹⁵⁸ The district court held Title VI of the Communications Act preempted the County's Board of Supervisors from requiring unlawful conditions on the transfer request.¹⁵⁹ First, the court noted that Congress enacted several provisions under Title VI "to establish a national policy concerning cable communications [that] minimize unnecessary regulation that would impose an undue economic burden on cable systems."¹⁶⁰ As previously stated, Congress explicitly passed the 1996 Act with the intent "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."¹⁶¹

Applying a two-prong approach to its preemption analysis, the court asked whether the ordinary meaning of the Communications Act accurately expresses the legislative purpose.¹⁶² The court answered in the affirmative because 47 U.S.C. §556(c) made it clear that any state or local law "inconsistent with *this Act* shall be deemed to be preempted and superseded."¹⁶³ The court then looked at the 1996 Act and found Henrico County's franchise authority inconsistent with four separate provisions and therefore the Communications Act preempted the Board from regulating cable modem services and requiring open access.¹⁶⁴

It is interesting to note the court's hesitancy to find any kind of definition for

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 713.

¹⁵⁹ *Id.* at 714.

¹⁶⁰ *County of Henrico*, 97 F. Supp. 2d at 714; *see also* 47 U.S.C. §§521(1), (6) (2000).

¹⁶¹ 47 U.S.C. §230(b)(2) (2000).

¹⁶² *County of Henrico*, 97 F. Supp. 2d at 714 (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 57 (1990) (stating that the court looks at statutory intent in deciding whether state or local authority is preempted by Congress.); *see Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 383 (1992).

¹⁶³ *County of Henrico*, 97 F. Supp. 2d at 714 (emphasis added). Recall the District Court in Oregon read the same statute differently and inaccurately, finding any provision of State or Local authority providing "any franchise granted by such authority which is inconsistent with *this chapter* shall be deemed to be preempted . . ." and concluding the City of Portland was not preempted from placing open access requirement on AT&T's broadband service. *See AT&T Corp. v. City of Portland*, 43 F. Supp. 2d 1146, 1151 (D. Or. 1999).

¹⁶⁴ *County of Henrico*, 97 F. Supp. 2d at 714. For example, under 47 U.S.C. §541(b)(3)(D), local governments cannot require cable operators to provide telecommunications service or facilities as a condition of a franchise transfer, and the court found that the county required such a service from MediaOne when it imposed access to its cable modem platform facility "unbundled from the provision of content" to any requesting ISPs which they also provide. *Id.* Such a demand would mean MediaOne would have to provide a facility that provides a requesting ISP the means to send content between its customers. This would be a violation of the Communications Act. *Id.*

phrases or regulatory schemes merited to cable modem services. For example, under 47 U.S.C §544(e), the statute uses the phrase “any transmission technology.”¹⁶⁵ The district court, however, said that “although the exact technology required [to provide open access to multiple ISPs] cannot be determined from the record,” Henrico could not require MediaOne “to use some kind of multiple access technology and equipment” that would allow ISPs to access the cable modem platform.¹⁶⁶ Although the court found that MediaOne’s Road Runner service merited a statutory definition of “cable service,” such service that provides one way video programming transmission or subscriber interaction cannot be regulated by local government under 47 U.S.C. §541(c).¹⁶⁷ The court further noted that Congress prohibited any type of regulation that required access “for any additional types of video programming.”¹⁶⁸ Finally, the open access required by the county was a “traditional common carrier requirement” specifically prohibited from local regulation.¹⁶⁹

2. *The Fourth Circuit Finds MediaOne’s Cable Facilities to be “Telecommunications”*

On appeal, Fourth Circuit Judge M. Blane Michael began the opinion by stating that AT&T remained “the largest long distance telephone company in the country” and this case focused on its business expansion into the high-speed Internet market provided over cable facilities.¹⁷⁰ The Fourth Circuit narrowly interpreted the Communications Act, focusing on the open access provision that required AT&T to separate MediaOne’s Road Runner Internet access services from its cable platform, and compelled essentially to offer that trans-

¹⁶⁵ 47 U.S.C. §544(e) (2000).

¹⁶⁶ *County of Henrico*, 97 F. Supp. 2d at 715.

¹⁶⁷ *Id.* The court had found Internet service provided by Road Runner “contains news, commentary, games, and other proprietary content with which subscribers interact.” *Id.* at 715. By narrowly interpreting Road Runner Internet services, the court paralleled the statutory definition of cable service under 47 U.S.C. §541(c)(A), (B).

¹⁶⁸ *County of Henrico*, 97 F. Supp. 2d at 715.

¹⁶⁹ *Id.*; see also 47 U.S.C. §532(b)(2) (2000) (“Any Federal agency, State, or franchising authority may not require any cable system to designate channel capacity for commercial use by unaffiliated persons in excess of the capacity specified [herein].”). For example, the court also found that under the Act’s ban on common carrier requirements, no Federal, State or local authority could impose content provisions for cable services. *Id.* at 716. According to the district judge, Henrico County Ordinance imposing open access on MediaOne meant that the company had to transmit interactive “content” of other ISP’s such as news, electronic mail, web browsing and other various forms of programming. *Id.* at 713-16. The court reasoned this amounted to content regulation of cable services, violating the Communications Act. *Id.* at 716; see 47 U.S.C. §544(f)(1) (2000).

¹⁷⁰ *County of Henrico*, 257 F.3d at 359.

mission pipeline to unaffiliated ISPs.¹⁷¹ Road Runner's cable modem platform, once unbundled from its Internet access service, became a telecommunications facility according to the court and demanding from cable operators access conditions to such facilities was inconsistent with the Communications Act.¹⁷²

Reading 47 U.S.C. §541(b)(3)(D) the same way the lower court did, the Fourth Circuit concluded that although the Communications Act did not define the word "facilities" when used in the context of "telecommunications facilities," the language of the statute pointed to facilities that "are the physical installations or infrastructure necessary for transmission."¹⁷³ The court looked at Road Runner's high-speed Internet access—using MediaOne's cable modem broadband service with Internet connections—and found the cable modem platform to be the telecommunications facility "because it is a pipeline for telecommunications."¹⁷⁴ The Fourth Circuit found Henrico's open access provision to be preempted by the Communications Act because requiring a cable operator, such as MediaOne, to provide a telecommunications facility as a condition for transferring cable franchise control from MediaOne to AT&T contradicted federal law.¹⁷⁵

Unfortunately, this finding was erroneous because the transmission of information through this pipeline, according to the Fourth Circuit, was without change.¹⁷⁶ However, Internet transmission changes the information, whether it is an e-mail or video content. The court failed to see this because it focused on the act of providing the transmission facility rather than the transmission itself.¹⁷⁷ The County argued that MediaOne offers traditional cable services, and therefore, under the Communications Act, the cable system cannot be considered a telecommunications facility.¹⁷⁸ The court responded and stated that the Communications Act foresees facilities, some of which can be used to provide

¹⁷¹ *Id.* at 362-63.

¹⁷² *Id.* at 363.

¹⁷³ *Id.*

¹⁷⁴ *Id.* A good example of this would be a company that builds an HOV lane and provides a vehicle to get you from home to work. This would be a bundled service, and AT&T essentially argued no other company can rent cars to consumers and use its proprietary HOV lane. The court agreed with AT&T, saying once you unbundled the road and the vehicle, the road itself is a telecommunications facility. By applying the plain language of the statute, rather than defining the proper regulatory classification of Road Runner's Internet service, the Fourth Circuit simply held "Henrico County violated §541(b)(3)(D) when it conditioned the transfer of control of MediaOne's cable franchise by requiring MediaOne to unbundled its Road Runner service and provide open access" to its cable platform, a telecommunications facility. *Id.* at 365.

¹⁷⁵ MediaOne Group, Inc., v. County of Henrico, 257 F.3d 356, 363 (4th Cir. 2001).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*; see 47 U.S.C. §522(7) (2000) (defining a cable system as "a facility ... that is designed to provide cable services which includes video programming").

“more than one type of service.”¹⁷⁹ Under the 1996 Act, a multi-purpose facility can receive different types of regulatory classifications, such as telecommunications, cable, and even information service.¹⁸⁰ The court found that MediaOne maintained a “cable system,” but it concluded MediaOne’s separate cable modem platform be classified as “telecommunications facilities” when used to provide Internet access.¹⁸¹

This was as far as the court was willing to read into the Act, concluding that “open access conditions violate . . . the Communications Act.”¹⁸² Although the Fourth Circuit was asked by several parties to determine the specific regulatory classification of MediaOne’s Road Runner Internet service, the court was not willing to discuss the merits of open access because that issue was not the present controversy.¹⁸³ The court pointed out that the FCC, in its *amicus brief*, had “diplomatically” reminded them that regulating cable broadband, just like all interstate communications services, fell under its jurisdiction.¹⁸⁴ The task of assigning the proper regulatory classification to high-speed Internet services “is complex and subject to considerable debate,” and best left to the FCC, especially since they had initiated a proceeding to examine classification and open access issues.¹⁸⁵ Any final conclusion would have a profound effect on how the Communications Act treats Internet Services.¹⁸⁶

¹⁷⁹ *Id.* at 364. This was a conclusion that the court did not support with any findings of fact, and it bordered on regulation, which is best made by the expertise of the FCC.

¹⁸⁰ *MediaOne Group, Inc., v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001). For example, the court stated 47 U.S.C. §522(7)(C) contemplates a common carrier facility that offers video services directly to customers to be considered as a cable system, “unless the extent of such use is solely to provide interactive on-demand services.” *Id.*

¹⁸¹ *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d at 364.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 365. The court noted that the FCC was well under way to determine the policy question and related issues. As the court stated, the judges are “content to leave these issues to the expertise of the FCC.” *Id.* at 365.

¹⁸⁶ *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d at 365 (Widener, C.J., concurring) (arguing that he would arrive at the same conclusion under a different analysis other than federal preemption). While the Henrico Co. Ordinance required MediaOne to open its cable modem platform, this was contrary to federal law. Judge Widener’s concurrence pointed out that state law provided that “no locality may regulate cable television systems by regulations inconsistent with either laws of the Commonwealth or federal law relating to cable television operations.” (emphasis in original). *Id.*; see also VA. CODE ANN. §15.2-2108(E) (2004). Judge Widener noted that Virginia law prevented “counties from running afoul of the Federal Communications Act.” *Id.* at 365.

IV. GIVING DEFERENCE TO THE FINAL ARBITER OF DIFFICULT AND COMPLEX COMMUNICATIONS DECISIONS SUBJECT TO DEBATE

When the Pole Attachment Act¹⁸⁷ passed in the late 1970s, Congress sought to protect a struggling cable industry by setting regulatory caps on the fees paid to utility companies for using space on utility poles as a right-of-way.¹⁸⁸ Utility companies had a monopoly on the poles and the cable industry did not want to be charged exorbitant pole attachment rates when providing video services through coax cables attached to the poles.¹⁸⁹ The statute gave the FCC enforcement authority to “regulate the rates, terms, and conditions for pole attachments,” to make sure such agreements are “just and reasonable,” and to be the arbitrator for any pole attachment disputes.¹⁹⁰ Over the next two decades, this authority granted by Congress was held to be within the bounds of the Constitution, encouraged cable companies to offer nonvideo data services in addition to traditional TV signals, and it permitted both the FCC and the United States Court of Appeals for the District of Columbia to deny utility companies the ability to charge higher rates for these additional pole attachments.¹⁹¹

¹⁸⁷ Communications Act Amendment of 1978, Pub. L. No. 95-234, §6, 92 Stat. 33 (codified at 47 U.S.C. §224 (2000)).

¹⁸⁸ S. REP. NO. 95-580, at 13 (1977), *reprinted* in 1978 U.S.C.C.A.N. 109, 121 (“[T]here is often no practical alternative to a CATV system operator except to utilize available space on existing poles.”).

¹⁸⁹ *See* *Tex. Utilities Elec. Co. v. FCC*, 997 F.2d 925, 929-30 (D.C. Cir. 1993). As the court noted, without the protection from pole attachment monopoly prices, the viability of cable television would have been threatened. *Id.* at 927. The D.C. Circuit decided that the Pole Attachment Act was ambiguous as to the FCC authority to regulate cable lines that transmit non-video service, but the FCC reasonably interpreted the Act to extend its authority and regulate the terms, rates and conditions of these wires. *Id.* at 395.

¹⁹⁰ 47 U.S.C. §224(b)(1) (2000) (“[T]he Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders . . .”).

¹⁹¹ *See* *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987) (holding that rates set by FCC did not amount to unconstitutional taking); *see also* *In re Heritage Cablevision Ass’n of Dallas, L.P., and Texas Cable TV Ass’n, Inc. v. Tex. Utilities Elec. Co.*, *Memorandum Opinion and Order*, 6 FCC Rcd. 7099 (1991) (finding cable operator providing traditional (video) and nontraditional cable service such as broadband communications and data transmission services, merited a single regulated pole attachment by utility pole owner), *recon. dismissed*, 7 FCC Rcd. 4192 (1992), *aff’d sub nom.* *Tex. Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (finding the Pole Attachment Act was ambiguous as to the FCC’s authority to regulate additional attachments providing nonvideo services, but its interpretation finding broad jurisdiction based on Congressional intent was reasonable).

A. The Eleventh Circuit Regulates the Internet in *Gulf Power Company v. FCC*

When Congress amended 47 U.S.C. §224 under the Telecommunications Act of 1996, it expanded the FCC's regulatory authority to establish a rate formula for any pole attachment set "by a cable television system or provider of telecommunications service" to any pole controlled by a telephone or power utilities.¹⁹² The FCC broadly interpreted its legislative jurisdiction to set the rates for attachments, including any wire attached by a cable operator that delivered traditional video and Internet services "commingled on one transmission facility."¹⁹³ Utilities argued unconvincingly that the 1996 Act overruled prior FCC and court decisions upholding its jurisdiction to regulate such comingled services because either: (1) cable attachments should be used solely for traditional cable services, otherwise those attachments are subject to telecommunications service rates; or (2) Internet services did not qualify for cable or telecommunications services classification, and therefore FCC authority fell outside the scope of §§224(d) (cable services) and (e) (telecommunications services).¹⁹⁴ The cable industry said the law applied to any kind of wire whether it carried a video signal or provided high-speed Internet access; otherwise, it would frustrate the timely deployment of broadband services to consumers.¹⁹⁵ The public utilities argued cable companies no longer needed rate regulation because they were not a struggling industry and therefore were exploiting an outdated law.¹⁹⁶ "It would make little sense," the Commission concluded, "that a cable operator should lose its rights under Section 224 by comingling Internet and traditional cable services."¹⁹⁷ The Act itself defines

¹⁹² Telecommunications Act of 1996 §703(2), 47 U.S.C. §224 (a)(4) (2000).

¹⁹³ *In re Implementation of Section 703(e) of the Telecommunications Act of 1996, Reporter and Order*, 13 FCC Rcd. 6777, paras. 30, 40 (1998) (codified at 47 C.F.R. §§ 1.1401-1.1418) [hereinafter *Pole Report and Order*] (finding it was Congress' "intent to expand the pole attachment provisions beyond their 1978 origins.").

¹⁹⁴ *Id.* at para. 28; see also *In re Heritage Cablevision Ass'n of Dallas, L.P., and Texas Cable TV Ass'n, Inc. v. Tex. Utilities Elec. Co., Memorandum Opinion and Order*, 6 FCC Rcd. 7099 (1991) (finding cable operator providing comingled traditional (video) and nontraditional cable service such as broadband communications and data transmission services, including data transmission on a comingled, merited a single regulated pole attachment by utility pole owner), *recon. dismissed*, 7 FCC Rcd. 4192 (1992), *aff'd sub nom.*, *Tex. Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

¹⁹⁵ Yocki J. Dreazen & Robert S. Greenberger, *High Court Backs Cable-TV Industry on Pole Fee Rates*, WALL ST. J., Jan. 17, 2002.

¹⁹⁶ *Id.*; see also *Pole Report & Order*, *supra* note 193, at para. 14.

¹⁹⁷ *Pole Report and Order*, *supra* note 193, at para. 31 (stating that cable operators choosing to expand their offerings by providing Internet broadband would be penalized if no longer entitled to Section 224 benefits. This would be contrary to Congress's intent to bring competition into the communication industry). The FCC concluded that Congress initially set out to "remedy the inequitable position between pole owners and those seeking pole

“pole attachment” to include “any attachment by a cable television system.”¹⁹⁸ Therefore, under 47 U.S.C. §224(f), added by the 1996 Act to protect not only cable but also “a host of new telecommunications carriers,” the FCC required any utility monopoly that owned a pole to allow “nondiscriminatory access” and gave cable broadband providers that commingled their Internet and video services space on the utility pole without being charged an additional rate.¹⁹⁹

Power companies challenged the *Pole Report and Order* filing several petitions for review in various circuit courts across the country.²⁰⁰ These various petitions triggered a lottery conducted by the Judicial Panel on Multidistrict Litigation under 47 U.S.C. §2112, and the cases were consolidated in the United States Court of Appeals for the Eleventh Circuit.²⁰¹ In *Gulf Power Co. v. Federal Communications Commission*, the Eleventh Circuit reviewed the challenges to agency regulations applying the two-step *Chevron* analysis.²⁰² The court read §224(f) without ambiguity and decided “pure statutory construction” should govern the case and gave no deference to the FCC’s expert analysis regarding the 1996 Act.²⁰³ The Eleventh Circuit became an immediate

attachments. The nature of this relationship is not altered when the cable operator seeks to provide additional service.” *Id.*

¹⁹⁸ 47 U.S.C. §224(a)(4) (2000). (emphasis added).

¹⁹⁹ *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1268 (11th Cir. 2000).

²⁰⁰ *Id.* at 1266; see 47 U.S.C. §402(a) (2000) (“Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.”); see also 28 U.S.C. §2342(1) (2000) (“The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47.”); see also 28 U.S.C. §2112(a)(3) (consolidating multidistrict litigations in one circuit court selected by random lottery procedure).

²⁰¹ See 47 U.S.C. §2112(a)(3) (2000). As will be evident by this Comment and the subsequent Supreme Court decision, the Eleventh Circuit was incorrect in its interpretation of the 1996 Act, as well as its non-application of administrative deference. Had this case landed at the D.C. Circuit Court instead of Atlanta, the case would probably have come out differently, given the D.C. Circuits decision in *Texas Utilities*. See *supra* text and accompanying note 187-191.

²⁰² *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1271-72 (11th Cir. 2000), *rev’d and rem’d*, *Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

We use the two-step *Chevron* analysis to review agency interpretations of a statute.

Under *Chevron* step one, we determine whether Congress has spoken unambiguously to the question at issue. If it has, our inquiry ends; we give effect to Congress’ intent.

Under *Chevron* step two, if we determine that Congress’ intent is ambiguous, we defer to a reasonable agency interpretation of Congress’ intent.

Id.; see generally *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁰³ *Gulf Power Co.*, 208 F.3d at 1273 n.21 (“[Q]uestions of pure statutory construction fall within a *Chevron* step one analysis. We therefore owe no deference to an agency’s construction of a statute.”). The court essentially read §224(f) in a vacuum rather than look-

expert on communications law, and two judges decided to impose their wisdom over that of the FCC's staff. The court found that the FCC had no statutory authority to regulate Internet services because 47 U.S.C. §224(a)(4), (d)-(e) only prescribed pole attachment rates for a cable television system or provider of telecommunications services.²⁰⁴ The Eleventh Circuit read the plain language of the Pole Attachment Act proscribing two regulatory rates and concluded the FCC could only exert jurisdiction if Internet services qualified as either cable or telecommunications service.²⁰⁵ The court narrowly read the definition of cable services under the Communications Act and concluded that Internet service was neither a cable nor telecommunications service.²⁰⁶ The judges mistakenly took it upon themselves not only to characterize the regulatory scheme cable broadband deserved (an administrative function), but also to restrain the Commission's authority over this type of communications service (a legislative function).²⁰⁷

Although the legislative history showed Congress' forward-thinking intent to see cable video programming move towards an interactive service, the court found no significant changes in defining cable services under either the 1978 or 1996 Act.²⁰⁸ If Congress wanted to expand the definition of cable services to include all types of interactive services, including the Internet, it would have done it, according to the court.²⁰⁹ Despite the fact that the definition of cable

ing at the entire 1996 Act, meant to provide an unfettered communications environment.

²⁰⁴ *Id.* at 1276. (Carnes, C.J., dissenting in part) (stating that the plain language of §224(b)(1) mandates the court to find the FCC has regulatory authority over Internet services) Based on the definition of pole attachment under §224(a)(4) as "any attachment by a cable television system," Judge Carnes pointed out the Eleventh Circuit Court had previously ruled that the adjective 'any' has an expansive meaning. *Id.* at 1280.

²⁰⁵ *Id.*

²⁰⁶ *Id.* The argument of whether the Commission had the jurisdiction to regulate the Internet as a telecommunications service was not an issue raised by the FCC to the court. *Id.* at 1277. The Eleventh Circuit stated such argument could not have been raised in any instance because the Commission had previously defined the Internet as an information service, not a cable service. *Id.* See *Universal Service Report*, *supra* note 56, at para. 66 ("Internet service providers themselves provide information services . . ."). The court's circular argument however lacks merit because the FCC could only classify Internet services as information services if it had jurisdiction.

²⁰⁷ In one way the court said that the statute was unambiguous, but when defining Internet service, it was not clear what Congress intended. Therefore it imposed its own regulatory definition for what cable service could and could not include, limiting the innovative growth of new technologies.

²⁰⁸ *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1276 (11th Cir. 2000) ("The only difference between th[e] definition of 'cable services' [found in the 1978 Act vs. 1996 Act] is the addition of the words 'or use'."); see 47 U.S.C. §522(6)(A)(B) (2000). The court found that the only mention by Congress of expanding the scope of "cable services" was found in a House report that stated "or use" was meant to "reflect the evolution of video programming towards interactive services." *Gulf Power Co.*, 208 F.3d at 1276.

²⁰⁹ *Gulf Power Co.*, 208 F.3d at 1276.

services includes “the one-way transmission to subscribers of video programming or other programming service, and subscriber interaction . . . or other programming service,” the court did not want to read this section so broadly as to include Internet services.²¹⁰ The court pointed out that this definition of cable services was quite similar under the 1996 Act when Congress passed the Pole Attachment Act in 1978.²¹¹ Interestingly, the Eleventh Circuit “epiphanyzed” that the Internet wasn’t around during the Carter Administration and therefore “[w]hen Congress used this language then, it could not have intended it to cover Internet services provided by cable companies.”²¹²

The Eleventh Circuit relegated the decision by its sister D.C. Circuit in *Texas Utilities Electric Co. v. FCC* to a footnote, essentially stating that it was more competent to decide this issue than the D.C. Circuit.²¹³ In *Texas Utilities*, the D.C. Circuit had given deference to the FCC for almost the same decision to regulate cable lines as pole attachments whether they carried video or data.²¹⁴ The Eleventh Circuit pointed out the case was decided prior to Congress passing the 1996 Act.²¹⁵ During the time of polyester pants and bellbottoms, Congress did not specify the “type of service to be distributed over the attachment,” whereas after the 1996 Act, Congress eliminated any ambiguity, and now, emphasized “the type of service over the type of entity.”²¹⁶ As proof of this erroneous conclusion, it noted that §224(d)(3), as amended, read “solely cable services” are subject to the FCC’s cable rate formula.²¹⁷ Therefore, the Eleventh Circuit did not need to follow the D.C. Circuit.²¹⁸ However, the statute actually reads this way:

This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable services. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.²¹⁹

²¹⁰ *Id.* at 1276-77; see also 47 U.S.C. §522(6)(B) (2000).

²¹¹ *Gulf Power Co.*, 208 F.3d at 1276.

²¹² *Id.* at 1277. This disregards the fact that other sections of the Communications Act mention the Internet. For the court to conclude that Congress needs to write the word “Internet” everywhere it intends for this service to expand, it was mistaken. This would be an inefficient way to write legislation. That is why Congress established the Federal Communications Commission.

²¹³ *Id.* at 1277, n.32 (“Because we now know that [47 U.S.C. §224(d)(3)] emphasizes the type of service over the type of entity acquiring the attachment, we have no need to follow the reasoning of *Texas Utilities Electric Co.*”).

²¹⁴ See *Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

²¹⁵ *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 n.32 (11th Cir. 2000).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ 47 U.S.C. §224(d)(3) (2000) (emphasis added). Section 224(e) set a statutory dead-

The court did not ignore §224(d)(3) which mentioned to provide any telecommunications service,²²⁰ but rather it accepted the FCC at its word when the Commission specifically said that the Internet is not a telecommunications service.²²⁰ So the Eleventh Circuit decided the FCC knew better when it came to defining communication terms, but statutory interpretation was best left to them, not the D.C. Circuit, and certainly not the administrative experts.

B. The Supreme Court Brings Sense to Statutory Construction and Administrative Decision Making

The FCC appealed the decision to the Supreme Court, arguing that Congressional intent found in the text of the Pole Attachment Act required reversal.²²¹ Between the Eleventh Circuit's statutory construction and the FCC, it was the Commission's construction of the Communications Act that was entitled to deference.²²² The FCC argued that the court should not have been compelled to characterize Internet services as neither qualifying for cable television services or telecommunications service because this issue was expressly left undecided by the Commission for another day.²²³ Read in its entirety, the 1996 Act's pol-

line for the FCC to set regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.²²⁴ *Id.* §224(e)(1). Because §224(d) set one rate formula for cable systems and §224(e) set another rate formula for telecommunications carriers, one could read the words solely to provide cable services as differentiating between two types of services after the statutory deadline expires.

²²⁰ *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 (11th Cir. 2000) (stating that previous FCC policy decisions had concluded that Internet services were not the provision of a telecommunications service under the 1996 Act.); *see also Pole Report and Order*, *supra* note 193, at para. 33. In one way, the court accepted the FCC's reasonable interpretation that Internet services were not telecommunications, but then it rejected the Commission additional findings. One could argue that if an administrative body did the Eleventh Circuit's ruling, such decision would be bit arbitrary and capricious.

²²¹ Brief for the Federal Petitioner, 2001 WL 345195, at 27-28, *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power*, 534 U.S. 327 (2002) (No. 00-832, 00-843) [hereinafter *FCC Gulf Petition*].

²²² *Id.* The FCC tried to make the case that nothing in §224 required a narrow statutory interpretation. If Congress wanted to limit the Commission's authority to regulate pole attachments providing traditional cable services, they would have been explicit in the legislation.

²²³ *Id.* at 29-30. The FCC had not taken a position on the type of regulatory scheme merited to Internet services, stating that making such a decision would have very broad implications for the rights and obligations of cable systems.²²⁴ *Id.* at 30. The issue left unanswered by the FCC was the question of open access – should cable systems be forced to open their cable modem platform to independent, third party ISPs? The FCC told the Supreme Court that even if it felt a final decision could not be reached until some legal authority properly characterized cable broadband, then the case should be remanded back to the Commission for a proper regulatory finding. *Id.* at 30-31.

icy was to make Internet services widely available.²²⁴ The Eleventh Circuit's interpretation of the 1996 Act meant cable operators would provide broadband services at their peril, losing any rate protection.²²⁵

When the case arrived at the Supreme Court, Solicitor General James Feldman argued from the onset that the FCC read the definition of pole attachment under §224 to clearly include any attachment by a cable television system.²²⁶ At issue was the use of these attachments by cable operators to provide bundled video and Internet access.²²⁷ One of the first questions Mr. Feldman was asked focused on distinguishing between who was doing the attaching and its purpose — “is Internet access part of a cable television system?” — and responding that the FCC had not decided the issue.²²⁸ Justice Scalia's line of questioning centered on the proper regulatory definition and whether the attachment used by a cable television system is an attachment used for television services, telecommunications, or something else?²²⁹ The Government argued it would not matter because any attachment would be covered under §224(a)(4) in either situation.²³⁰ But then Justice Scalia asked, “how the [C]ommission could possibly resolve [the proper rate for Internet services] without ever purporting to decide whether Internet is telecommunications?”²³¹ Mr. Feldman argued that the FCC had jurisdiction under 47 U.S.C. §224(d) and (e) to set the rates for any attachment, no matter what the regulatory definition would be under cable or telecommunications services.²³² Although Justice Kennedy pointed out that Internet service could theoretically be classified as neither cable nor telecommunications, the Court did take note that the agency's view on the proper regulatory definition was under a proceeding review.²³³

The Court was concerned whether the FCC acted under general authority or

²²⁴ *Id.* at 21.

²²⁵ *Id.*

²²⁶ TRANSCRIPT OF ORAL ARGUMENTS, Nat'l. Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co., 2001 WL 1183370, at 4-5 (2001) [hereinafter ORAL ARGUMENTS].

²²⁷ Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co., 534 U.S. 327, 330 (2002).

²²⁸ *Id.* at 6. Counsel for Respondents, Thomas P. Steindler argued that if the FCC had gone through the administrative procedure to classify cable modem service as either cable, telecommunications, or information services, and that decision would have survived judicial review, then respondents would not have a claim. *Id.* at 42. But the reason why both parties were arguing before the Court, according to Mr. Steindler, was the FCC's refusal to arrive at a classification for broadband over cable services. *Id.* at 43.

²²⁹ *Id.* at 7.

²³⁰ *Id.* Respondents argued that under the doctrine of *exclusio unius* that section §§224 (d) and (e) “are the only purposes that are authorized here, and others are intended to be excluded”. *Id.* at 31. The Eleventh Circuit had concluded “that §§224(d) and (e) implicitly limit the reach of §224(a)(4) . . . as a result, it was compelled to reach the question of the correct categorization of Internet services.” *Gulf Power*, 534 U.S. at 336-37.

²³¹ *Id.* at 7.

²³² ORAL ARGUMENTS, *supra* note 226, at 9-10.

²³³ *Id.* at 10.

specific authority to regulate cable under 47 U.S.C. §224(d) or to regulate telecommunications under 47 U.S.C. §224(e).²³⁴ The Justices repeatedly asked whether it would be best to remand the issue of jurisdictional basis back to the FCC.²³⁵ The Government argued that the FCC acted under general authority to regulate the rate of any attachment by a cable television system, whatever that attachment could be.²³⁶ Justice Ginsburg clarified, “[s]o, you’re asking us to say that the FCC does have authority. Which particular rate category it falls under is for another day.”²³⁷ The Government replied, “[t]hat’s right . . . [Congress] had an intent that Internet access should be characterized however it should be characterized . . . the fact that the cable television system is providing something else through that wire . . . doesn’t preclude the FCC’s jurisdiction.”²³⁸ Finally, the Justices asked about a proper outcome to resolve the matter if they reversed the Eleventh Circuit and found the FCC to have general jurisdiction: (1) would the case “have to await [the] ongoing rule making to determine which category [broadband over cable] this is, or (2) would there be something for the Eleventh [Circuit] to do on remand once we say [the FCC has] jurisdiction to do something?”²³⁹ The Government argued that the only issue before the Eleventh Circuit on remand would be to decide the reasonable analysis conducted by the FCC to arrive at a decision.²⁴⁰

Justice Kennedy, writing for the majority, concluded that 47 U.S.C. §224 was unambiguous and the Act’s plain text defining pole attachment as “any attachment *by* a cable television system” was the proper issues “and . . . what matters under the statute.”²⁴¹ The Court concluded that a cable attached by a

²³⁴ *Id.* at 33-34.

²³⁵ *Id.* at 10-11, 19-20.

²³⁶ *Id.* at 12. Respondents not only argued that Congress would have “intended to give jurisdiction that was undefined,” but also Mr. Steindler argued this was a unique case because it involved the electric industry, regulated by the Federal Electrical Regulatory Commission. *Id.* at 33-35. One justice counter-argued by saying, “Yes, but it’s very narrow because they’re only talking about attachments to utility poles.” *Id.* at 35.

²³⁷ ORAL ARGUMENTS, *supra* note 226, at 13.

²³⁸ *Id.* at 13, 18-19.

²³⁹ *Id.* at 20.

²⁴⁰ *Id.* Essentially, the DOJ argued that the Eleventh Circuit would be doing a Chevron step 2 analysis on remand.

²⁴¹ Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co., 534 U.S. 327, 333 (2002), quoting 47 U.S.C. §224(a)(4) (2000). (emphasis added). The Respondents had argued that a communication entity can best be regulated under the 1996 Act by the type of service it does. See ORAL ARGUMENTS, *supra* note 226, at 32-34. The Court answered this line of reasoning by stating “the word ‘by’ still limits pole attachments by who is doing the attaching, not by what is attached.” *Id.* at 335. So, if a cable facility offers video and Internet services, it still remains a cable television system. This completely ignores the convergence of communications. See *id.* at 339 (finding a contradictory interpretation of the 1996 Act would defeat Congress’ general instructions to the FCC to encourage the deployment of broadband Internet capability).

cable operator remains an attachment, whether you provide video, Internet, or possibly telephone.²⁴² As the Court noted, “[t]he addition of a service does not change the character of the attaching entity—the entity the attachment is ‘by.’”²⁴³ But even if this reading of the statute was ambiguous, the Court said that the FCC’s interpretation would still be accepted, providing it was reasonable.²⁴⁴ Even though the statute did not mention the Internet or information services, the Court concluded that the FCC has “authority to fill gaps where the statute is silent.”²⁴⁵

Like a father instructing its twelve circuit court children about reviewing future FCC administrative decisions, the Supreme Court found the 1996 Act to increase the agency’s authority, especially with issues that are “technical, complex, and dynamic.”²⁴⁶ Although Respondents argued that the FCC dodged the difficult regulatory category for Internet and commingled services, the Court found the FCC could not be faulted for making piecemeal conclusions.²⁴⁷

²⁴² *Id.* at 333. The Court pointed out that Respondents raised the issue of attachment propriety not argued to the Eleventh Circuit of the FCC. *Id.* at 328. One should not look at who is doing the attaching but rather what does the attachment do? If the attachment does anything outside of traditional cable services, meaning besides video, then the service falls outside the Act. Obviously, this argument completely ignores the reason why Congress passed the 1996 Act, which was to move communications into the future and not the past. One could read between the lines that the Supreme Court would grant the FCC wide discretion on a “technical and complex” subject matter such as categorizing Internet services. *Id.* at 328.

²⁴³ *Id.* at 333.

²⁴⁴ *Id.* In other words, the Court if applying step one or step two *Chevron* deference, would still conclude that the FCC made the right call. As the Court pointed out, the burden would be placed on the Respondents to 1) “refute the proposition that ‘any attachment’ means ‘any attachment’” and 2) “they must prove also the FCC’s interpretation is unreasonable.” *Id.*

²⁴⁵ *Id.* at 339. The Court concluded that if the FCC reversed its findings and eventually decided that broadband was not a cable service, then the agency’s “interpretation of §§224(a)(4) and (b) [was] sensible.” *Id.* at 328.

²⁴⁶ *Nat’l Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 336 (2002). In the Court’s reading of §224, Congress intended to increase the FCC’s jurisdiction. When Congress crafted the 1996 Act, it was aware that both the FCC and the D.C. Circuit Court had addressed the issue of regulating commingled services such as video and data over cable lines. *Id.* at 360. Despite the D.C. Circuit’s conclusion in *Texas Utilities*, Congress did not limit §224(a)(4) and (b) but rather it maintained the FCC’s broad authority. *Id.* Under the Act, “cable television systems that also provide Internet services are still covered by §224(a)(4) and (b)—just as they were before 1996.” *Id.* at 336. In one way, the High Court proclaimed that both the FCC and the D.C. Circuit Court are competent to handle communications law and policy questions.

²⁴⁷ *Gulf Power*, 534 U.S. at 338. Respondents could not understand how the FCC could set a §224(d) rate without categorizing Internet services or deciding whether commingled services are cable services under the Act. The Court’s majority left this issue unresolved for another day. Justice Thomas, along with Justice Souter dissenting in the opinion, argued “the specific legal issue the Court chooses to address is, at this time, nothing more than a tempest in a teapot.” *Id.* at 348.

There was no way for Congress to know exactly how to regulate the pole attachment rates for future commingled services such as cable TV and broadband (and now possibly VoIP) when it passed the 1996 Act.²⁴⁸ The FCC has the statutory discretion to make policy that impacts broadband. Perhaps judicial review should give greater deference to the agency under the *Chevron* standard.²⁴⁹

In this case, the FCC made a policy decision not to subject the cable industry to utility monopoly pricing, instead allowing market forces, investment and, innovation to thrive. If it were done otherwise, then such regulation "would defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment'."²⁵⁰ The Court concluded that if the FCC arrived at a conclusion based on this congressional mandate, then courts should find it reasonable.²⁵¹

C. FCC Finally Decides to Classify and Deregulate Broadband Over Cable

One reason why the federal courts in *City of Portland, County of Henrico*, and *Gulf Power* were compelled to litigate the merits of broadband over cable regulation can be traced back to the FCC leadership's lack of policy direction.²⁵² At that time, FCC Chairman William Kennard sent mixed messages to industry and local government officials, advocating the importance of a national policy for broadband, while touting the merits of open access.²⁵³ Cable

²⁴⁸ *Id.* at 339. In this case, the regulation centered on the "just and reasonable" rates the Commission. This could be said about any regulatory scheme that affects or impacts commingled services, especially those that involve broadband. As previously noted, Congress knew the FCC and the D.C. Circuit had dealt with cable systems provided two different services along its attachments, and yet it did reverse those decisions through legislation.

²⁴⁹ *Id.* at 339. The fact that the Court was willing to extend *Chevron* deference to the FCC without remanding the issue of regulatory interpretation back to the agency or the Eleventh Circuit, was a signal to all Circuit Courts that difficult questions that were technical, complex and dynamic should be left to experts in communications policy.

²⁵⁰ *Id.* quoting Telecommunications Act of 1996, Pub. L. No. 104-104, §706(a), (b), and (c)(1), 110 Stat. 153 (set forth as note following 47 U.S.C. 157 (2000)).

²⁵¹ *Id.* at 338-39 ("We note that the FCC, subsequent to the order under review, has reiterated that it has not yet categorized Internet services."). When the Court stated issues surrounding the regulatory classification of communications services would be difficult, dynamic in nature, and therefore best left to the FCC, the Justices seems to be anticipating a future Certiorari request. *Id.* at 336. The Court tried to give other Circuits some instructions on how to approach judicial review and administrative deference. Apparently, the Ninth Circuit disregarded the Supreme Court.

²⁵² Gruley, *supra* note 4, A1 ("Policy makers are writing, or choosing not to write, rules that will determine who gets access to the pipelines that connect people to the Internet . . .").

²⁵³ Kathy Chen, *FCC's Kennard to Argue Against Rules on Broadband Web Access at Local Level*, WALL ST. J., July 21, 1999, at A4 [hereinafter Chen, *Web Access*] ("Mr. Ken-

industry leaders such as AT&T Corp. Chairman C. Michael Armstrong became frustrated with local governments imposing communications policy with national implications.²⁵⁴ Due to the lack of leadership coming from the FCC, Mr. Armstrong began to ask Congressional leaders for a clear direction on this issue.²⁵⁵ Some commentators referred to the FCC as “the giant who refused to come on stage,” while a business article reported that court battles such as these could potentially have influence on E-commerce, all because of the federal vacuum.²⁵⁶

Chairman Kennard announced in June of 2000 that the FCC would launch a Notice of Inquiry to seek comments on the implications of regulating broadband over cable as either a telecommunications, cable or information service.²⁵⁷ Although industry experts stated that such proceedings addressing the regulatory classification of cable modem service would likely be completed within a year, it wasn't until after the Supreme Court nudged the FCC that the Commission finally arrived at a regulatory decision.²⁵⁸ This inquiry lasted nearly two years, receiving over 250 filings, with input from various industry representatives, consumer advocates, and both state and local government officials.²⁵⁹

The FCC's *Cable Declaratory Ruling* concluded that “cable modem service, as it is currently offered, is properly classified as an interstate information

nard . . . wants to ensure a national no-regulation policy for the Internet, rather than let local governments impose rules. [However], FCC staff will meet with the agency's local and state government committee this week to hear local officials concerns and explain his stance.”). Chairman Kennard was telling local government to stay out of the federal courts and perhaps all parties could come to some resolve. However, that kind of compromise should be left up to Congress when drafting communication legislation. The FCC Chairman, appointed by President Bill Clinton, was trying to appease consumer groups by advocating open access to broadband cable. However, if companies were going to spend money upgrading their cable systems, they did not want to have a free rider problem. Chairman Kennard failed to be a regulator, instead wanting to be a legislator. See also Lake and Brill, *supra* note 28, at 8.

²⁵⁴ Kathy Chen, *AT&T to Appeal Florida Internet-Access Ruling*, WALL ST. J., July 15, 1999, at B6 [hereinafter Chen, *Appeal*] (“Mr. Armstrong argued that open access should be addressed at the national level.”); see also Kathy Chen, *Another Cable Vote Over Open Lines Upsets AT&T Plan*, WALL ST. J. July 14, 1999, at B7 [hereinafter Chen, *Cable Vote*]. Not only was AT&T fighting with local government officials in Portland, Oregon, but the Commissioner in Broward County, Florida had also voted to require cable television systems to open their lines to rival ISPs. *Id.*

²⁵⁵ Lake and Brill, *supra* note 28, at 8.

²⁵⁶ Gruley, *supra* note 4, at A1.

²⁵⁷ See *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry*, 15 FCC Rcd. 19,287 (2000) [hereinafter *Cable Access NOI*]; see also Lake and Brill, *supra* note 28, at 8 (“The agency's resulting ruling will be reviewable in the federal courts, and normally would be entitled to deference—although it will be interesting if review ends up in the 9th Circuit . . .”).

²⁵⁸ See generally *Cable Declaratory Ruling*, *supra* note 15, at paras. 3-4, n.10-11.

²⁵⁹ Lake and Brill, *supra* note 28, at 8.

service, not as a cable service, and that there is no separate offering of telecommunications service.”²⁶⁰ Prior to these cases, the FCC had concluded “Internet access service is appropriately classified as an information service, because the provider offers a single, integrated service, Internet access, to the subscriber.”²⁶¹ With respect to broadband over cable, and consistent with the 1996 Act, cable modem services “does not include an offering of telecommunications services to subscribers” but rather broadband provides these capabilities via telecommunications.²⁶² In the *Universal Report*, cited by the FCC in the *Cable Declaratory Ruling* and once again adopting similar policy conclusions, found the definitions of “information services” and “telecommunications services” under the 1996 Act had established mutually exclusive categories of service.²⁶³

The Commission’s findings and conclusions reminded everyone that the Supreme Court in *Nat’l Cable & Telecomm. Ass’n v. Gulf Power Co.* observed, in connection with the FCC’s interpretation of the Pole Attachment Act and its application to cable modem service, that the subject matter of defining the regulatory scheme of Internet broadband over cable was “technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent.”²⁶⁴ The Ninth Circuit regulators should have heeded these words. As the FCC pointed out, in *AT&T v. City of Portland*, the Ninth Circuit made its decision “based on a record that was less than comprehensive.”²⁶⁵ The Commission noted that the Ninth Circuit could have made a narrow ruling by “finding that a cable modem service is not a cable service.”²⁶⁶ After the FCC explained its detailed analysis of what the 1996 Act mandated, it concluded, “that cable modem service is . . . an interstate information service” and its regulation falls squarely within the FCC’s jurisdiction.²⁶⁷

²⁶⁰ *Cable Declaratory Ruling*, *supra* note 15, at para. 7.

²⁶¹ *Id.* at para. 36.

²⁶² *Id.* at para. 39; *see also* 47 U.S.C. §153 (2000).

²⁶³ *See Universal Service Report*, *supra* note 56, at para. 39 (“[W]hen an entity offers transmission incorporating the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,’ . . . it offers an ‘information service’ even though it uses telecommunications to do so.”).

²⁶⁴ *Nat’ Cable & Telecomm. Ass’n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 339 (2002).

²⁶⁵ *Cable Declaratory Ruling*, *supra* note 15, at para. 57. *See supra* text and accompanying notes 123-125.

²⁶⁶ *Cable Declaratory Ruling*, *supra* note 15, at para. 58. *See supra* text and accompanying notes 126-128.

²⁶⁷ *Cable Declaratory Ruling*, *supra* note 15, at para. 59.

V. REGULATING BROADBAND FROM THE BENCH

A. *Brand X Internet Service v. FCC*

In a consolidated case of seven petitions seeking review of the Commission's Declaratory Ruling from three different circuits, the court in *Brand X Internet Service v. FCC*²⁶⁸ revisited its previous decision in *AT&T v. City of Portland* on a related matter.²⁶⁹ In *Portland*, the Ninth Circuit concluded that broadband Internet service to subscribers over cable broadband facilities was partly a telecommunications service under the Communications Act.²⁷⁰ In *Brand X*, the court stated that "[w]e must decide whether our prior interpretation of the Telecommunications Act controls review of the [FCC's] decision to classify Internet service provided by cable companies exclusively as an interstate 'information service.'"²⁷¹ The court vacated the FCC's finding that cable modem service is an information service.²⁷² Its opinion was based on *stare decisis*.²⁷³

The Ninth Circuit's decision was a big financial win, not only for Brand X Internet Services and other ISP's like EarthLink,²⁷⁴ but also for telephone companies who compete with cable companies by providing high-speed Internet services using DSL.²⁷⁵ These entities were not keen on having to compete for broadband services under two different regulatory schemes.²⁷⁶ By contradict-

²⁶⁸ 345 F.3d 1120 (9th Cir. 2003).

²⁶⁹ See discussion *infra* Parts III.A.1.2.

²⁷⁰ *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

²⁷¹ *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1123 (9th Cir. 2003).

²⁷² *Id.* at 1125 ("[W]e held [in *Portland*] that cable modem service contained both information service and telecommunications service components.").

²⁷³ *Id.* at 1132. See *supra* note 16-20 and accompanying text.

²⁷⁴ See Dave Baker, Earthlink's Vice President of Law and Public Policy, Press Statement, *Earthlink offers response to FCC Filing*, (Aug. 28, 2004) ("Instead of fighting to protect cable monopolies, the FCC should recognize that cable modem and other broadband users deserve choice in high-speed Internet providers.").

²⁷⁵ See Dan Ackman, *Big Win for Brand X*, *Forbes.com*, at www.forbes.com/2003/10/07/cx_da_1007topnews (Oct. 7, 2003).

²⁷⁶ Sherille Ismail, *Parity Rules: Mapping Regulatory Treatment of Similar Services*, 56 FED. COM. L. J. 447, 485 (2004) ("Perhaps the most significant barrier to achieving regulatory parity is that it is rarely the case that two types of providers are so alike that they must be treated in exactly the same manner."); see also *Wireline Broadband NPRM*, *supra* note 10, at para. 25 ("[I]n the case where an entity combines transmission over its own facilities with its offering of wireline Internet access service, the classification of that input is telecommunications, and not a telecommunications service."); see also *Cable Declaratory Ruling*, *supra* note 15, at para. 85 ("To what extent should our decision regarding multiple ISP access requirements be influenced by the desirability of 'regulatory parity'?"). Pending legislation introducing in the Senate and referred to the Committee on Commerce, Science, and Transportation would require the FCC to develop rules that provide for parity in regulatory treatment of broadband service providers and broadband access services providers. See

ing the FCC and concluding that cable modem broadband services are neither exclusively "information service" nor "telecommunications service" but rather a combination of the two, cable television companies would be subject to open-access rules that govern the telephone industry.²⁷⁷

B. Parties Seek Writ of *Certiorari*

The FCC and the United States Solicitor General challenged the Ninth Circuit's decision as a usurpation of national communications policy that the expert administrative agency developed, based on a Congressional mandate.²⁷⁸ In essence, the court limited the growth of cable broadband services by imposing burdensome regulations.²⁷⁹ The communications policies at issue in this case, according to the FCC, were of "of immediate and compelling national importance" that will either promote or delay "the timely and universal deployment of broadband Internet access."²⁸⁰

Along with the Government, the National Cable and Telecommunications Association ("NCTA") joined by Charter Communications, Cox Communications, and Time Warner Cable Inc., asked the Supreme Court to review the Ninth Circuit's decision to vacate the FCC's conclusion that broadband over cable was an information service.²⁸¹ As Petitioner, NCTA sought a writ of *certiorari* and argued that this decision "could not be more pivotal to the future

Broadband Regulatory Parity Act of 2002, S. 2430, 107th Cong. 2d Sess. (2002).

²⁷⁷ *Brand X Internet Services v. FCC*, 345 F. 3d 1120, 1127, n. 11 (9th Cir. 2003). The practical result of such a classification is that cable broadband providers would be required to open their lines to competing ISPs. As the Commission pointed out in its *Cable Declaratory Ruling*, although the Ninth Circuit in *Portland* determined that broadband over cable was in part a telecommunications service, the court also acknowledge the FCC "has broad authority to forbear" any type of telecommunications regulation that the Commission concludes it is in the best interest of consumers under §10 of the Communications Act, 47 U.S.C. §160. See *AT&T Corp. v. City of Portland*, 216 F. 3d 871, 879 (9th Cir. 2000); see also *Cable Declaratory Ruling*, *supra* note 15, at para. 58 n.219. Although the FCC concluded it would not forbear from Title II regulation in this instance, "we do tentatively conclude that such regulation [cable modem service in part telecommunications service] would not be appropriate and . . . should forbear." *Id.* The Ninth Circuit practically endorsed the FCC's broad authority when it acknowledged "Congress reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters." *AT&T Corp. v. City of Portland*, 216 F.3d at 879-80.

²⁷⁸ Petition for a Writ of *Certiorari*, *FCC v. Brand X Internet Services*, 2004 WL 1943678 at 15 (2004) (No. 04-281) [hereinafter FCC Petition].

²⁷⁹ Paul Davidson, *FCC Asks High Court to Rule on Broadband*, USA TODAY, Aug. 31, 2004, at B3.

²⁸⁰ FCC Petition, *supra* note 278, at 15. ("Rejecting the FCC's expert conclusion is particularly unsettling because the Ninth Circuit refused to analyze the merits of the FCC's statutory interpretation.")

²⁸¹ John Eggerton, *NCTA, Too, Seeks Brand X Review*, BROADCASTING & CABLE, Aug. 31, 2004.

of not only cable modem service but also all other forms of broadband.”²⁸² NCTA agreed with the FCC’s conclusion that broadband services should be minimally regulated.²⁸³ If the Ninth Circuit’s decision to regulate cable modem service in part as a telecommunications service is not overturned, then NCTA contended “cable modem service and by extension every other broadband service . . . [will be subjected to] common carrier regulation.”²⁸⁴ This could stifle much needed investment, innovation, and broadband deployment for the U.S. economy.²⁸⁵

C. The Ninth Circuit Applies the Wrong Standard to Sound FCC Policy

The legal questions raised by both parties in part involved *Chevron U.S.A. Inc. v. Natural Resources Defense Council*.²⁸⁶ Under the Supreme Court’s two-step *Chevron* deference analysis to judicial review of administrative statute construction, a circuit court’s first step is to determine:

[W]hether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue...[and] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.²⁸⁷

Under step two of the *Chevron* analysis, if a statute found in the Communications Act is silent or ambiguous on the precise question, then the court should determine whether the FCC’s interpretation of agency-administered statutes is reasonable and if so, it will defer to the agency.²⁸⁸ The Ninth Circuit refused to extend *Chevron* deference in *Brand X* because *stare decisis* under *AT&T v. City of Portland* trumped ensuing agency statutory interpretation.²⁸⁹ This

²⁸² Petition for a Writ of Certiorari, *NCTA v. Brand X Internet Services*, 2004 WL 1944011, at *18 (2004) (No. 04-277) [hereinafter *NCTA Petition*]. The FCC has expressed an intent “to develop an analytical framework that is consistent, to the extent possible, across multiple platforms,” including cable, telephone, terrestrial wireless, and satellite facilities); see also *Wireline Broadband NPRM*, *supra* note 10, at para. 6.

²⁸³ *NCTA Petition*, *supra* note 282, at 17-19.

²⁸⁴ *Id.* at 19.

²⁸⁵ See generally *U.S. Chamber Report*, *supra* note 68, at 31.

²⁸⁶ 467 U.S. 837 (1984).

²⁸⁷ *Id.* at 842-43 (instructing circuit courts that if it determines “Congress did not directly address the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation.”) (emphasis added). It would have been difficult to define the regulatory classification of Internet services in the 1996 Act, since this communications medium was in its inception.

²⁸⁸ *Id.*

²⁸⁹ *Brand X Internet Services v. FCC*, 345 F. 3d 1120, 1135 (9th Cir. 2003) (Thomas, C.J., concurring) (“[O]nce we have fulfilled our judicial function in interpreting an act of

analysis was apparently supported by *Neal v. United States* according to the Ninth Circuit's reading of this Supreme Court case.²⁹⁰

The Supreme Court granted *certiorari*, and both the FCC and the U.S. Solicitor General raised two issues in their petitions regarding legal certainty and clarification by the Justices.²⁹¹ The first question presented was whether a circuit court's construction of the Communications Act remains binding precedent within the Ninth Circuit, even in light of FCC's subsequent contrary interpretation of the statute.²⁹² Currently, there is a circuit split on the relations between *stare decisis* and administrative rule making.²⁹³ The second legal is-

Congress and have determined the meaning is clear, the subsequent action of an agency cannot and should not alter our conclusion."). Though the Ninth Circuit stated their previous interpretation in *Portland* on how the 1996 Act classifies broadband services wasn't "the only one possible," the court hinted they might read the relevant sections of the Act as unambiguous. *Id.* at 1131.

²⁹⁰ 516 U.S. 284, 294-95 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."); see also *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003) ("[T]here is nothing to suggest that *Neal's* rule should apply only when it is the Supreme Court (and not the court of appeals) construing the statute in question.").

²⁹¹ See Ross A. Bunstock & Michael B. Hazzard, *FCC Appeals "Brand X" Decision to Supreme Court*, at <http://www.wcsr.com/FSL5CS/telecommunicationsmemo> (Sept. 1, 2004) ("The FCC's appeal of the *Brand X* decision raises significant legal and policy issues that may be of significant interest to the Court."); see also Botein, *supra* note 12, at 342 n.136. (stating the Supreme Court of the United States will consider and grant a petition for a writ of certiorari "only when there are special and important reasons therefore" such as "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings.") (quoting Sup. Ct. R. 10).

²⁹² *Brand X Internet Service*, 345 F.3d at 1131. But see FCC Petition, *supra* note 278, at 1 ("Whether, under the framework set out in *Chevron* . . . the FCC was entitled to decide that, for purposes of regulation under the 1996 Act, cable operators offering so-called 'cable modem service' provide only an 'information service' and not a 'telecommunications service'"); see also NCTA Petition, *supra* note 282, at 1 ("Whether the court of appeals erred in holding that the FCC had impermissibly concluded that cable modem service is an 'information service,' without a separately regulated telecommunications service component, under the Communications Act of 1934, 47 U.S.C. 151 et seq.).

²⁹³ Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 31 (2004); see also Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L. J. 2225, 2253 (1997) ("The circuits that have considered the issue have split on what rule to adopt."). See, e.g., *Heimermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002) ("Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as the agency's answer is based on a permissible construction of the statute.") (internal quotation marks omitted); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (Newman, J.) ("We have concluded that the interests of nationwide uniformity outweigh our adherence to Circuit precedent in this instance . . . Accordingly, we have sought and obtained the concurrence of the [prior] panel to abandon that precedent . . ."); *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996) (quoting *Joshua*); *Satellite Broad. & Communications*

sue for the Supreme Court that *Brand X* raised centers on the Ninth Circuit's broad interpretation of the *Neal* rule. The Supreme Court in *Neal* stated that "once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law."²⁹⁴ The Ninth Circuit stated that, "there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question and the Court itself has never asserted that the power to authoritatively interpret statutes belongs to it alone."²⁹⁵ This broad interpretation of the *Neal* rule by the Ninth Circuit failed to realize that the *Neal* Court used the phrase "once we have" rather than "once courts have."²⁹⁶ The Supreme Court will be asked if there are in fact pressing reasons for limiting *Neal*.²⁹⁷ The Ninth Circuit Court of Appeals may get a definitive answer from the Supreme Court stating circuit

Ass'n v. Oman, 17 F.3d 344, 348 (11th Cir. 1994) ("Because we did not address the 'clear meaning' of [the statute] in [our prior precedent], this circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in [our prior precedent]."); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) (Winter, J.) ("New regulations at variance with prior judicial precedents are upheld unless they exceeded the Secretary's authority or are arbitrary and capricious.") (internal quotation marks and brackets omitted); *United States v. Joshua*, 976 F.2d 844, 855 (3rd Cir. 1992) ("Where a prior panel of this court has interpreted an ambiguous statute in one way, and the responsible administrative agency later resolves the ambiguity another way, this court is not bound to close its eyes to the new source of enlightenment. In addition to securing the expertise of the agency, this approach tends to promote uniformity in the application of the statute."); *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1482 n.* (D.C. Cir. 1989) (Ginsburg, C.J.) ("Our discussion rejecting [prior circuit precedent] has been separately circulated to and approved by the entire court, and thus constitutes the law of this court"). *Contra Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1374-75 (Fed. Cir. 2000) (adhering to judicial precedent articulated in *Neal* "apply equally to decisions rendered by circuit courts of appeal"); *Indus. TurnAround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) ("We are precluded from adopting [the agency's interpretation] as the law of the Circuit because it stands in conflict with . . . a prior panel opinion of this court."); *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991) ("Chevron does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body.").

²⁹⁴ *Neal v. U.S.*, 516 U.S. 284, 295 (1996); see NCTA Petition, *supra* note 282, at 22 ("Commentators have criticized *Neal*'s dictum as incompatible with *Chevron*'s principle that statutory silence or ambiguity signals a delegation of decision-making authority to the responsible agency."); see e.g., Russell L. Weaver, *The Emperor Has No Clothes: Christensen, Mead and Dual Deference Standards*, 54 ADMIN. L. REV. 173, 192 (2002) (allowing *stare decisis* to prevail over deference is "strikingly inconsistent with *Chevron*'s underlying principles"); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1319 (2002) ("Denying agencies policymaking power when the judiciary rules on an issue first freezes in place decisions made by an institution with an avowedly inferior ability to assess social conditions and without the constitutional capacity to make political choices.") (footnote omitted).

²⁹⁵ *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003).

²⁹⁶ *Neal*, 516 U.S. at 295.

²⁹⁷ See generally NCTA Petition, *supra* note 282, at 23.

courts may not usurp administrative decisions by citing to *stare decisis*.²⁹⁸

Several parties agree that the decision by the Ninth Circuit Court of Appeals to create communications policy had tremendous repercussions with national importance. Although the court vacated the FCC's Declaratory Ruling treating cable modem as an information service in *Brand X*, it was its prior decision in *AT&T v. Portland* that resulted in inappropriate policymaking from the judicial branch. The Supreme Court may end up not addressing the substance of the Commission's findings and conclusions regarding cable modem. Instead, the Court may rule that the Ninth Circuit Court applied the wrong law. The Justices could remand the case back to the West Coast with instructions to apply a *Chevron* deference standard outlined by the Court, perhaps clarifying its position under the *Neal* rule and requiring a "substantive review regardless of the *Portland* precedent."²⁹⁹ Thereafter, we may be left with regulatory uncertainty that will not benefit communications policy or the economy. At the end of the day, the Ninth Circuit in a possible *Brand X II* may find under *Chevron* deference that "the FCC still got it wrong," meaning more appeals to come.³⁰⁰

VI. CHALLENGING THE FCC'S FINAL ORDER

A. Exclusive Provisions Under the 1996 Act for Procedural and Administrative Review

Parties to an FCC proceeding that wish to challenge the Commission any U.S. Court of Appeals can file petitions for review under 28 U.S.C. §2342 for any rulemaking procedure, policy statements and most non-licensing orders under 47 U.S.C. §402(a) where a petitioner can establish venue.³⁰¹ Appeals of application proceedings, such as licensing decisions, as well as providing long-distance service between two local exchange carriers in different regions under 47 U.S.C. §271 ("interLATA"), may be filed only in the U.S. Court of Appeals

²⁹⁸ If administrative findings and orders become persuasive authority and courts can establish what the law should be prior to any FCC decisions, then parties and the courts could frustrate the reason why Congress set up expertise administrative bodies. This would be setting the cart before the horse.

²⁹⁹ Reed Business Information, *DOJ Wants Freedom for Broadband*, at <http://www.americasnetwork.com/americasnetwork/articledetail.jsp?id=121627> (Sept. 23, 2004). For example, the Supreme Court may decide: (1) the *Neal* rule applies only to Supreme Court decisions, (2) the 1996 Act was silent or ambiguous when classifying information services, and therefore (3) the Ninth Circuit should only conduct a *Chevron* step two analysis in determining whether the FCC's finding in the *Cable Declaratory Ruling* were reasonable.

³⁰⁰ *Id.*

³⁰¹ 28 U.S.C. §2342(1) (2000); see also 47 U.S.C. §402(a) (2000).

for the District of Columbia Circuit under 47 U.S.C. §402(b).³⁰² These two Communications Act provisions are “mutually exclusive,” meaning the issue comes down to the FCC’s licensing powers or rulemaking process.³⁰³ Although judicial review under both provisions differ as to the FCC’s authority, “[m]any statutes and [procedural] rules . . . apply to both.”³⁰⁴

The D.C. Circuit is perceived as the *de facto* specialized court in communications law because of its exclusive jurisdiction under §402(b).³⁰⁵ Even though the court hears the majority of licensing cases, many appeals under §402(a) such as rulemaking and policy matters also end up in the D.C. Circuit.³⁰⁶ As Professor Botein points out, “some litigants still prefer the D.C. Circuit over other Courts of Appeal, because of its perceived ‘pro-regulatory’ jurisprudence—which may have waned somewhat in recent years.”³⁰⁷ However, after the passage of the 1996 Act, this perception quickly evaporated.³⁰⁸

As previously discussed in this Comment, “new technology” has been a problem for the court’s members. As former Chief Justice Taft once com-

³⁰² *Id.* §402(b).

³⁰³ Botein, *supra* note 12, at 320, n.18; *see also* Cook, Inc. v. United States, 394 F.2d 84, 86 (7th Cir. 1968) (“[A]ppeals from orders of the Commission in exercising its ‘licensing powers’ must be taken to the District of Columbia Circuit. All other orders fall within the general coverage of §402(a). Sections 402(a) and (b) are mutually exclusive.”); *see also* Vernal Enter., Inc. v. F.C.C., 355 F.3d 650, 655-57 (D.C. Cir. 2004).

³⁰⁴ *See* Botein, *supra* note 12, at 322-23, 330.

³⁰⁵ *Id.* at 322. Although accepted as the *de facto* specialized court in communications law, Professor Botein states that “the need for this type of *de facto* specialized court is less than clear today.” *Id.* at 324. However, this statement was made prior to the 1996 Act, and I would argue more than ever that this exclusive jurisdiction is merited, especially since there is legislative history indicating Congress has given the D.C. Circuit exclusive jurisdiction over other pressing national issues. *See supra* notes 12, 35 and accompanying text.

³⁰⁶ *See* United States Telecomm. Ass’n v. FCC, 359 F.3d 554, 564 (D.C. Cir. 2004); *see also* Fox Television Stations v. FCC, 280 F.3d 1027, 1048 (D.C. Cir. 2002); *see also* Tex. Utilities Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

³⁰⁷ *Id.* at 322.

³⁰⁸ *Compare* United States Telecomm. Ass’n v. F.C.C. 359 F.3d 554, 564 (2004) (“Various CLECs, state commissions, and an association of state utility consumer advocates filed petitions for review in several other circuits; these petitions were transferred to the Eight Circuit under the random lottery procedure established in 28 U.S.C. §2112(a)(3), and transferred to this court by the Eight Circuit under 28 U.S.C. §2112(a)(5)); *with* Fox Television Stations v. FCC, 280 F.3d 1027, 1048 (D.C. Cir. 2002) (construing the 1996 Act to “carr[y] with it a presumption in favor of repealing or modifying the ownership rules.”) *amended by*, 293 F.3d 537, 540 (D.C. Cir. 2002) (holding that the FCC had not sufficiently explained its reasons for retaining either the national television owners rule set at thirty five percent by Congress and its cable/broadcast cross-ownership rule after determining that both rules remained “necessary in the public interest.”) *and* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 152 (D.C. Cir. 2002) (“Commission has failed to demonstrate that its exclusion of non-broadcast media in the eight voices exception [to the local ownership rule] is not arbitrary and capricious . . . remand the local ownership rule to the Commission for further consideration.”).

plained, "interpreting the law on this subject is something like trying to interpret the law of the occult. It seems like dealing with something supernatural."³⁰⁹ Most people reading the 1996 Act while trying to interpret Congressional intent have marched to court to figure out the "supernatural." While federal judges today may feel like Justice Taft when he said, "I want to put this off as long as possible in the hope that it becomes more understandable," the number of cases involving the FCC and communications law litigated in the D.C. Circuit shows why they should be considered the *de facto* specialized court by other circuit courts.³¹⁰

When Congress passed the 1996 Act, they extended the D.C. Circuit's exclusive jurisdiction under 47 U.S.C. §402 (b) to include section (9), which says, "By any applicant for authority to provide interLATA services under section 271 of this Act whose application is denied by the Commission."³¹¹ The principal reason for passage of the Act was "to foster a competitive market in telecommunications" and Congress wanted to make sure litigated issues in-

³⁰⁹ Botein, *supra* note 12, at 324.

³¹⁰ Botein, *supra* note 12, at 324-25. See generally *U. S. Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied* *Nat'l Ass'n of Regulatory Utility Com'rs v. U.S. Telecomm. Ass'n*, 125 S. Ct. 313 (2004). Compare generally *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999); with *U.S. Telecomm. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied* *WorldCom, Inc. v. U.S. Telecomm. Ass'n*, 538 U.S. 940 (2003). All of these cases implicated national communications policy, and they came before the court either under 47 U.S.C. §402(b)(9) because Congress gave the D.C. Circuit exclusive jurisdiction over the interLATA issues raised by these cases or under 28 U.S.C. §2115(a)(5), transferring related cases filed in other circuit courts to the D.C. Circuit. See *U. S. Telecomm. Ass'n*, 359 F.3d at 564 ("ILECs filed two mandamus petitions with this Court . . . and in addition filed a petition for review here. Various CLECs [and other parties] filed petitions for review in several other circuits; these petitions were transferred to the Eight Circuit under the random lottery procedure (28 U.S.C. §2112(a)(3)) and then transferred to this court (under 28 U.S.C. §2115(a)(5))"; see also *In re Heritage Cablevision Assoc. of Dallas, L.P., and Texas Cable TV Ass'n, Inc. v. Tex. Utilities Elec. Co.*, *Memorandum Opinion and Order*, 6 FCC Rcd. 7099 (1991) (finding cable operator providing commingled traditional (video) and nontraditional cable service such as broadband communications and data transmission services, including data transmission on a commingled, merited a single regulated pole attachment by utility pole owner), *recon. dismissed*, 7 FCC Rcd. 4192 (1992), *aff'd sub nom. Tex. Utilities Elec. Co. v. FCC*, 997 F. 2d 925 (D.C. Cir. 1993). The D.C. Circuit Court got acquainted with commingled cable services carrying traditional video and non-video communications long before passage of the 1996 Act.

³¹¹ 47 U.S.C. §402(b)(9) (2000). The statute states, in relevant part, that parties can appeal a Commission order to the United States Court of Appeals for the District of Columbia in nine various instances, including §402(b)(9): "by any applicant for authority to provide interLATA services under section 271 of this Act whose application is denied by the Commission." *Id.* Section 402(b) was amended under the 1996 Act to include section (9). See *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 107, §276 (1996). It implicated an issue of national policy (local and long distance calling) since the 1996 Act was passed specifically to open up competition in phone service. See *U.S. Telecomm. Ass'n v. FCC*, 359 F.3d at 561. Congress could once again amend 47 U.S.C. §402(b) to include a section (10) which pertains to national broadband policy.

volving telecommunications exchange carriers would be heard in a uniform way.³¹² Congress added §271 to the 1996 Act specifying the conditions under which a Bell Operating Company (BOC) could provide interLATA services.³¹³ For example, the Commission required a BOC apply for authorization pursuant to §271(d) in order to provide long distance services in an in-region State.³¹⁴ FCC approval depended on the BOC's agreements with competitors on inter-connection and open access.³¹⁵

B. Litigated Outcome Based on Venue "Lottery"

When parties file a judicial challenge to a federal agency order, venue for these litigated cases will be proper in any federal circuit where the case has been filed under the Hobbs Act. This is true for most federal agency rules because "many statutes do not specify a particular circuit as the court to handle these challenges."³¹⁶ Venue is described as "the judicial circuit in which the petitioner resides or has its principal office, or the U.S. Court of Appeals for the District of Columbia Circuit."³¹⁷ Unlike the exclusive jurisdiction found in §402(b) that restricts parties to file in the D.C. Circuit, 28 U.S.C. §2342(1) and 47 U.S.C. §402(a) provides several fora for litigants.³¹⁸ Until recently, this encouraged a "race to the courthouse" because 28 U.S.C. §2112, prior to its amendment in 1988, contained a "first to file" rule that stated "the proper circuit of venue would be the circuit where the appeal of the agency was first filed."³¹⁹ During the 1980s, when the debate over deregulating communications law began, FCC decisions were challenged on "ideological overlays" — and the race was on to choose either a "liberal, pro-regulation court [or] a conservative pro-market court."³²⁰

Congress amended 28 U.S.C. §2112 to do away with the "first to file" rule and instead established a procedure "for judicial review of an agency order

³¹² See generally *U. S. Telecomm. Ass'n v. FCC*, 359 F.3d 554, 561-64 (2004).

³¹³ See *BellSouth Corp. v. FCC*, 162 F.3d 678 (D.C. Cir. 1998) (upholding the constitutionality of §271).

³¹⁴ 47 C.F.R. §53.101 (2005); see *AT&T v. FCC*, 220 F.3d 607, 633 (D.C. Cir. 2000) (upholding the first Commission approval of a section 271 application).

³¹⁵ *BellSouth Corp.*, 162 F. 3d at 692-93 (D.C. Cir. 1998); see also *U.S. West Communications, Inc. v. FCC*, 177 F. 3d 1057 (D.C. Cir. 1999), *cert denied*, 528 U.S. 1188 (2000).

³¹⁶ S. REP. NO. 100-263, at 2 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198.

³¹⁷ 28 U.S.C. §2342 (2000).

³¹⁸ Botein, *supra* note 12, at 336.

³¹⁹ S. REP. NO. 100-263, at 2 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198; See generally Nicholas Fels, *Beyond the Stopwatch: Determining Appellate Venue on Review of FERC Orders*, 1 ENERGY L. J. 35, 42 (1980) (citing various problems that occurred with litigants standing at the courthouse doors waiting to be the first to file).

³²⁰ Botein, *supra* note 12, at 337.

[that has] been filed in more than one circuit.”³²¹ The Judicial Panel on Multi-district Litigation (Judicial Panel) would establish a lottery to choose from the various petitions filed for review. Congress did not intend “to change the practice of having sequential or closely related orders issued in the course of the same or interrelated administrative proceedings treated as ‘the same order’ and reviewed by the circuit court reviewing the initial order.”³²² Any court selected by the Judicial Panel has the authority under 28 U.S.C. §2112(a)(5) to transfer cases to another proper circuit “for the convenience of the parties in the interest of justice.”³²³ The history of the FCC’s contentious Triennial Review concerning incumbent local exchange carrier’s obligations under 47 U.S.C. §251(c)(3), (d) to unbundled network elements (UNEs) and make available to competitive local exchange carriers is a good indication of how experienced the D.C. Circuit Court has become with Congressional and FCC communications policy.³²⁴ In *U.S. Telecommunications Association*, many parties challenging the FCC Triennial Review filed petitions for review in several circuits, but eventually these cases were consolidated in the Eight Circuit under 28 U.S.C. §2112(a)(3) and then transferred to the D.C. Circuit under 28 U.S.C. §2112(a)(5).

VII. CONCLUSION: WHY THE D.C. CIRCUIT SHOULD GET THE FINAL WORD ON BROADBAND

A national broadband policy that implements Congress’s desire to deregulate telecommunications in the U.S. will help entrepreneurs develop new ways of communications using the Internet, thus giving consumers greater choice through innovation. Emerging broadband technologies such as VoIP, BPL, video over IP, wireless broadband and fiber will help the U.S. economy grow as the communications infrastructure expands, eventually resulting in greater market competition. Congress established the FCC to develop a detailed communications policy that benefits both industry and consumers. A ubiquitous broadband deployment should neither depend on a “powerball” circuit court selection through lottery when appealing an FCC decision nor should it depend on jurists who may not be familiar with the intricacies of communica-

³²¹ S. REP. NO 100-263, at 4 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198, 3201.

³²² *Id.* at 5, *reprinted in* 1987 U.S.C.C.A.N. 3198, 3202.

³²³ 28 U.S.C. §2112(a)(5) (2002); *see* S. REP. NO 100-263, at 5 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3198, 3202

The selected court will retain its existing power to transfer all review proceedings dealing with the same order. Thus, S. 1134 does not, in any way, prevent the selected court from transferring the challenges to the agency order to a more proper circuit “for the convenience of the parties in the interest of justice.”
Id. (emphasis added).

³²⁴ *U. S. Telecomm. Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied* Nat’l Ass’n of Regulatory Utility Com’rs v. U.S. Telecomm. Ass’n, 125 S. Ct. 313 (2004).

tions policy. Under the Hobbs Act and 47 U.S.C. §402(a) current posture, parties from multiple industries impacted negatively by the FCC's national broadband efforts will continue to challenge such decisions in various circuit courts. These challenges may end up balkanizing national policy because the various circuit courts will invariably decide an FCC appeal through different analysis, defeating national purpose uniformity. In the interest of justice, efficiency, and a Congressional intent to consolidate similar subject-matter litigation into one federal forum, circuit courts should defer broadband related litigation to the United States Court of Appeals for the District of Columbia because of their expertise in the field. However, it may be unrealistic to expect that all judicial matters involving national communications policy will be *voluntarily transferred* from one appeals court to the D.C. Circuit because some judges may want to interject their "judicial objectivity" into matters of such national importance.

Congress has begun to re-examine the Communications Act and may soon revise portions of the Telecommunications Act of 1996 to confront various problems surrounding emerging technologies. One solution Congress might consider is the creation of a regulatory class for Internet Protocol-enabled broadband networks that keeps various services and applications free of federal and state regulation. In order to keep such Internet-based services from administrative and judicial uncertainty therefore, legislation should be introduced that would amend 47 U.S.C. §402(b)(1)-(9) and add a new (10) that gives the D.C. Circuit exclusive jurisdiction over issues related to broadband, classified and regulated by the FCC as an "information" service.³²⁵ The United States economy stands to benefit tremendously from national deregulatory policies that involve the widespread deployment of high-speed Internet access. The eleven circuit court benches that often replace Congress' communications policy judgment with their own should not frustrate this growth.

³²⁵ Connected on the Go: Broadband Goes Wireless, *Report by the Wireless Broadband Access Task Force* in Dkt. No. 04-163, at 6-7 (Mar. 8, 2005) (suggesting a pro-competitive, deregulatory framework for spectrum based broadband and consider classifying wireless broadband as "information service."); see *Vonage Order*, *supra* note 35.

